ERROR at the APEX

Invasive Interpretation of Human Rights

MUJEEB-UR-REHMAN

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.....The judges of the Supreme Court also need to know where they sometimes go wrong so that they may correct themselves for the future; and the law may progress.....

This book is a refreshing example of a healthy and balanced criticism.....

.....I hope the members of the bar and the teachers of law will make it a tradition to publish fair comments on important judgements of the Supreme Court....."

K. M. A. Samdani
(Justice Retired)

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.....When this religious authoritarianism is wedded to the mechanisms of state power, the result is an assault on the human, civil and religious rights of dissenting minorities.

.....To follow Mujeeb-ur-Rehman's dauntless progress through the law courts of Pakistan is to see this conflict exemplified in the struggle of the Ahmadis to affirm their self-identity as Muslims in the face of draconian legislation inspired by religious inquisitors under the pretext of protecting orthodox Islam."

Antonio R. Gualtieri
Professor of religion (retired)
Carleton University. Ottawa. Canada

ERROR AT THE APEX

INVASIVE INTERPRETATION OF HUMAN RIGHTS

SUPREME COURT OF PAKISTAN JUDGMENT
IN
AHMADIS' CASE

ZAHEERUD DIN VS THE STATE

(1993 SCMR 1718)

MUJEEB-UR-REHMAN

Oriental Publishers
2414 Major Mackenzie Drive, P.O. Box 96565
Maple, Ontario L6A 1B0, Canada
Email: Oriental_Publishers@yahoo.com

Published in Canada, August 2002

Canadian Cataloguing-in-Publication Data

Rehman, Mujeeb-ur-
Error at the apex : invasive interpretation of human rights - Supreme Court of Pakistan Judgement in Ahmadis' case, Zaheerud Din vs The State (1993 SCMR 1718) / Mujeeb-ur-Rehman. -- Maple, Ont. : Oriental Publishers, 2002.
xi, 118 p.

Includes notes and references.

ISBN 1-882494-25-3

1. Ahmadiyya and law. 2. Constitutional law -- Pakistan. 3. Denial of justice (Human rights) -- Pakistan. 4. Freedom of religion (International law). 5. Human rights -- Religious aspects -- Ahmadiyya. 6. Pakistan. Constitution. 7. Pakistan -- History. 8. Pakistan. Supreme Court. 9. Pakistan. Supreme Court -- Ahmadiyya -- Legal Cases. 10. Persecution -- Ahmadis' -- Pakistan. I. Title. II. Invasive interpretation of human rights - Supreme Court of Pakistan Judgement in Ahmadis' case. III. Zaheerud Din vs the State (1993 SCMR 1718).

KPL 1750 R345 2002 342.5491 -- 23dc.

Cover designed by Nabeel A. Rana (Nabeel@Canada.com)
Printed by Ansar Graphics & Printing Inc.
5170 Dixie Road, Unit # 9, Mississauga, Ont. L4W 1E3, Canada
Tel : 905-625-1352
Bound by Holmes, The Finishing House
200 Ferrier Street, Markham, ON L3R 2Z5
Tel : 905-513-6211

Dedication

This work is dedicated to those

who were incarcerated for no crime,

other than upholding their faith.

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K. M. A. Samdani
LL.M.(Yale)
Advocate, Supreme Court

Critical appreciation of the Supreme Court judgments is the need of the day but, unfortunately, the order of the day is to accept them as the last word. The Supreme Court is final but not infallible. As long as the human beings are not free from error, no intellectual opinion can ever be the last word.

The judges of the Supreme Court also need to know where they sometimes go wrong so that they may correct themselves for the future; and the law may progress. Progressive interpretation of law is the essence of a living society. A society, whose judiciary does not permit this, stagnates. Such a fate must, at all cost, be avoided.

This book is a refreshing example of a healthy and balanced criticism. One may or may not agree with the author. It is a different matter. There is a clear difference between appreciating a point of view and agreeing with it. All of us need to learn this and learn it well.

I hope the members of the bar and the teachers of law will make it a tradition to publish fair comments on important judgements of the Supreme Court.

#40, Street No.30, F-8/1, Islamabad. Tele: 2260601-4 - MOBILE: 0300-8569297

FAKHRUDDIN G. EBRAHIM & COMPANY
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This is perhaps the first occasion when a judgment of the Supreme Court of Pakistan has been analyzed in depth and its limitations exposed in language, which is both lucid and respectful. I had the privilege to representing the appellants in this case and I am still aghast that laws that sanction religious persecution continue to remain on our statute books. This book must be read by all who love freedom of religion and basic human rights.

30/4/2002

— Fakhruddin G. Ebrahim

Antonio R. Gualtieri
Professor of religion (retired)
Carleton University. Ottawa. Canada

Written by a lawyer seeking legal redress for his clients, this book quite naturally emphasizes case law and legal theory. It has, however, wider ramifications in the fields of political theory and comparative religion.

Anyone familiar with the persecution of the Ahmadi Muslim community under the government and courts of Pakistan, would have been better equipped to understand the events of September 11, 2001.

The historical record discloses that within most religions there resides a contradictory worm of totalitarian absoluteness that will riot tolerate dissent. When this religious authoritarianism is wedded to the mechanisms of state power, the result is an assault on the human, civil and religious rights of dissenting minorities.
To follow Mujeeb-ur-Rehman's dauntless progress through the law courts of Pakistan is to see this conflict exemplified in the struggle of the Ahmadis to affirm their self-identity as Muslims in the face of draconian legislation inspired by religious inquisitors under the pretext of protecting orthodox Islam.

Harvey Savage
Barrister & Solicitor

Formerly faculty at Dalhousie University and University of Toronto

REVIEW OF "ERROR AT THE APEX":
THE VOICE OF THE BROODING SPIRIT

There is a symmetry in the intelligently written text by Mujeeb-Ur-Rehman, lead attorney who pleaded *Zaheer ud Din vs. the State* before the Supreme Court of Pakistan. Both at the beginning and at the conclusion of his assessment, Mr. Rehman refers to his appeal to a future generation which will hopefully take action on the dissenting opinion in the case and implement the clear constitutional guarantees for Ahmadies and other religious minorities of their freedom of public religious worship. As such, Mr. Rehman's reference to Chief Justice Hughes, that "A dissent in the court of last resort is an appeal to the brooding spirit of law, to the intelligence of a future day", and his return to this reference at the conclusion of his text, frames its central issue: How independent can the judiciary ever be when there is no effective division between church and state?

This is an important book. On one level, it is a plea for the restoration of fundamental freedoms in a society where these have been abridged and violated by a succession of governments who have been doing so at the behest of religious extremists. And even worse, whose legislative enactments have permitted and sanctioned untold human rights violations on the basis of religious differences. On another level, like the canary in the mine pointing to the dangers lurking inside, Mr. Rehman's analysis exposes the danger lurking for the minorities of a country when a politically motivated court joins forces with a legally flawed constitution.

The majority opinion in the Supreme Court of Pakistan exposes an old trick when a court bent on dodging the 'fundamental freedoms' bullet, devises artificial arguments to support its conservative opinion. This is well-illustrated in Mr. Rehman's exposition of the manner in which the majority opinion invoked legal artifice to argue that Islamic principles and practices can be denied to Ahmadies on the analogy of trademark law. After extensively quoting from this 'strained' analysis, the author comments as follows: " Trademark law does not apply to deeply held religious epithets and practices. Faith and religion, worship and devotional acts are sublime and spiritual and are so personal between God and man, that no mundane, physical or commercial give and take or sale and purchase is conceivable.....It is an absurdity to apply trademark law to religion."

We in the West can draw scarce comfort from this sharp critique of a judiciary which uses verbal subterfuge and inappropriate analogies to avoid making a resounding endorsement of constitutional supremacy in the face of clear denial of basic freedoms. Judicial evolution in both Canada and the United States bear out similar concerns about the comfort freedom seekers may take from a court of last resort.

Witness the following comment on the early U.S. Supreme Court made by the distinguished journalist Richard Kruger in his excellent analysis in the text *Simple Justice* of the struggle of the Afro-Americans in the United States for equal rights in the century just ended:

"Perhaps the (United States) Supreme Court has won such vast hegemony precisely because Americans believe that its nine life-membership Justices are beyond the rough-and-tumble of everyday politics. In this, they would be mistaken, for any close reading of the Court's history reveals its constant intimacy with the political process, though usually one or two

removes from the killing ground. Or perhaps Americans retain a latent admiration, as has often been suggested, for the trappings of monarch - witness their fondness for political dynasties-and thus the cloistered proceedings and ceremonial bearings of the Justices fill a subconscious hunger. Or perhaps Americans simply wish to think that the Court, as the Court's arbiter of last resort, is composed of men both wise and incorruptible in a world where men possessing abundant deposits of either quality are rare".

This is not to imply that the American courts have been unwise, corruptible and simply doing the bidding of the political masters who have appointed them. But the important lesson is that Courts are not immune from applying overly restrictive interpretations of legislation, even of a constitutional guarantee, reflecting a certain political majority will or dominant economic interest. Thus, the United States Supreme Court has evolved from interpreting the Fourteenth Amendment of the U.S Constitution and its "due process" guarantees from the early days of equating due process to economic interests against equal access of minorities to the U.S. laws to its later days of interpreting due process more expansively to recognize equal access to the laws on the parts of minorities. The desegregation movement in the United States is testament to that, premised upon application of the equal protection clause of the Fourteenth Amendment to a guarantee of equal access to the education system of the United States to Afro-Americans (then called Negroes).

But it is the Canadian experience, and the interplay between the Supreme Court of Canada and the legislators seeking to abridge religious freedoms, which has more to say to the current state of religious minority freedom in Pakistan. The basis for this stems from a series of laws and the Court's interpretations of them in Canada in the 1940s and 1950s. They were laws being sought to severely restrict the religious freedom of Jehovah's Witnesses in Canada. Like the Ahmadies

in Pakistan, one of the main foundations of the religious belief of the Jehovah's Witnesses is the obligation to proselytize. In terms of a conflict with state mores, this translates into a right and freedom to practice the tenets of their religion in an open and public way.

The Witnesses were seen as a threat both to the federal government of Canada and to the province of Quebec, where the dominance of the Catholic Church was for many decades pre-eminent. A series of repressive laws passed by both levels of government, the War Measures Act on the federal level and various provincial by-laws passed in Quebec at the provincial level, not only prevented the Witnesses from preaching and carrying out their religious practices. They also resulted in numerous arrests and criminal and by-law charges as Witnesses were charged with a variety of offences such as violating the Lord's Day Act, disturbing the peace, peddling without a license, and even with sedition. Many were convicted; some were fined, and some were imprisoned. Many also appealed their convictions.

Ultimately, the Supreme Court of Canada rescued them and in the process made some strong pronouncements about freedom of worship. In one of the leading cases to make it to the Supreme Court, Mr. Justice Ivan Rand spoke eloquently for the Court:

"....freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."

It is very important to stress that this decision upholding religious liberty was made in the 1950s, an era well before either the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms, which latter document has entrenched

as a fundamental freedom "freedom of conscious and religion." The fact that such a powerful judicial endorsement of religious freedom could be made even in the absence of a constitutional document entrenching it only underscores Mr. Rehman's plea for a brave judiciary to step in and proclaim an obvious freedom.

Mr. Rehman raises a riveting question which resonates past the end of his analysis: Should not the presumption be against the validity of any statute abridging religious freedom? The mere fact that the right of religious freedom is referred to in virtually every democratic constitution in the world, including the Universal Declaration of Human Rights, clearly confirms that it is a natural law, and as such beyond the power of any legislator or Court to abridge or curtail in the name of whatever excuse it seeks to provide (in the case of the Pakistan government and Court majority the "excuse" would appear to be the overriding claims of Islamic law and the vague words of the constitutional amendment, 'subject to law'). In his view and in the view of leading international constitutional law scholars, the right of free religious worship is a non-derogable right.

That the majority decision in *Zaheer-ud-Din* is transparently a political decision seeking to mirror the state's wish for Islamic law to override conflicting fundamental rights is clear. The author's analysis how Mr. Justice Abdul Qadeer even contradicted his earlier positions on the effect of Article 2A of the Constitution in order to justify the position that he took, is as discouraging as it is insightful. One would like to think that perhaps if the constitution had a better and tougher amending formula its guarantees would not have been so vulnerable to flawed judicial analysis seeking to perpetuate the will of the government which in turn seeks to please the wishes of religious fundamentalists over fundamental rights of minorities.

But this wishful thinking is ultimately vacuous. The real issue is the powerful grip of the majority religion, and particularly by the mullahs, on the government of the day. Mr. Rehman puts it very succinctly near the end of his text: "At times it appears that in Pakistan state and clergy have merged their authority and none is available against the other to restore a balance in the society. As it is, the state seems to be using its political authority and apparatus to enforce change of theology by law."

We in the west can only wish his brave and intelligent advocacy well. In Canada, we had but a glimpse of this pernicious situation when an attempt was made to silence the Jehovah's Witnesses. But now that moment has passed. Church and state are thankfully separate entities. We have a Charter of Rights and Freedoms which is very difficult for the government of the day to amend. But we too have had our brave canaries to arrive at this point. And without doubt, Mr. Rehman serves excellently such a function today in Pakistan.

Harvey Savage
Barrister & Solicitor

Formerly faculty at Dalhousie University and University of Toronto

393 University Avenue
Suite 2000
Toronto, Ontario M5G 1E6

Ph: 416-585-2088
Fax: 416-597-2267

AUTHOR'S PREFACE

"Error at the Apex" is both, a chronicle and a critique of the legislative and the judicial events leading to gradual denial and erosion of religious freedom to Ahmadies in Pakistan. This work is intended to provide an insight into the background of the Supreme Court judgment in the Ahmadi's case. The author has tried to make it a readable book not only for the lawyers but also for all those interested in preservation and promotion of human rights.

Ahmadiyya community is internationally known and recognized among the international religions. The role and growth of the community has been a subject of many a research thesis in various universities of the world. There is a keen interest in, and a growing demand for greater information on, the situation of Ahmadiyya community in Pakistan. The judgment of the Pakistan Supreme Court in "Ahmadis' Case" has attracted some comments from international legal circles. The judgment is being cited and is also being questioned on some legal aspects. With a view to provide greater awareness into the issue, it was necessary to furnish the background and analysis of the judgment, to bring out in detail, the errors and anomalies, that have found their way into the judgment. The purpose of the author in writing the present work is to elucidate and place on record some of the facts and errors which the ordinary reader finds confusing in the judgment of the Supreme Court of Pakistan.

In view of the American case law cited in Zaheer ud Din the Minnesota Human rights Advocates prepared an amicus-brief to be submitted in the Supreme Court of Pakistan, contending that the American case Law had been misapplied. That amicus-brief, however, could not be submitted in Supreme Court of Pakistan. A copy of the brief was provided to the present author. The present author has benefited from the brief and the cases referred in the concluding part of the chapter 8 have been taken from the brief prepared by them. The effort of the Minnesota Advocates for Human Rights Advocates is acknowledged with deep sense of appreciation.

I am also beholden to Mr. Justice Fakhruddin G. Ebrahem, and Mr. Justice K.M.A Samdani who took the trouble of going through the book before it went out into printing and very kindly offered a brief comment to be included in on the dust cover. So als am I deeply indebted to professor Antonio R. Gualtieri. Professor of religion (retired) of the Carleton University, Otawa Canada and Barrister Harvey Savage, formerly faculty at Dalhousie University and University of Toronto, who contributed thought provoking and insightful comment and review. The majority opinion in Zaheer-ud-Din pointedly addressed the Human Right's concern of the west. The comments of Antonio R. Gualtieri and Harvey Savage reflect how the judgment is received in the West.

In the preparation of this work Nasir Amjad rendered valuable secretarial service and M. Ismat Pasha of Toronto was a great help in preparation of the initial draft. My son Waqas A. Rahman, Advocate has spent long hours and has taken pains in writing and re-writing the manuscript many times over and has provided and checked the references. I thankfully acknowledge their efforts. I hope and pray that their involvement in the work will evoke in them an abiding interest in the subject and they will, in their own time, be able to serve the cause of religious freedom and Human Rights.

Last but not least, I wish to place on record my overwhelming thanks and gratitude to Mostafa Sabet of Toronto for the enthusiastic support provided by him. I also thankfully acknowledge the genuine and sincere efforts of Hidayatullah Hadi of Toronto, Nabeel A. Rana of Cambridge and the Oriental Publishers. But for the efforts of these gentlemen, this book may never have seen the light of the day.

Mujeeb-ur-Rahman

To The Intelligence of a Future Day

"A dissent in the court of last resort is an appeal to the brooding spirit of law, to the intelligence of a future day."

Charles Evas Hughs CJ

In *Zaheer-ud-Din and others Vs The State* the Supreme Court of Pakistan decided a set of eight appeals involving denial of human right of religious freedom guaranteed under Article 20 of the Constitution of Pakistan. The judgment validates *Anti-Islamic Activities of Qadiani group, Lahori group and Ahmadis (Prohibition and Punishment) Ordinance 1984* and thereby not only sanctions curtailment of religious practices of Ahmadis but also by a devious interpretation converts their day to day religious practices into a crime[1] and even in some cases a Capital offence punishable with death. The judgment constitutes an interpretive invasion of Constitutional guarantee, and religious freedom, which is already in serious jeopardy in Pakistan, has become further vulnerable to erosion.

In more than one way the decision is a departure from established Constitutional principles and has many ominous implications. The judgment is in fact more pernicious for what has been left unsaid leaving dangerous openings for the future deleterious influences on freedom of conscience and on the Pakistani society as a whole.

The Supreme Court of Pakistan sits at the apex of Pakistan judiciary and when it decides a case it decides it finally between the parties. A rule of law laid down by the Supreme Court is binding on all other courts of Pakistan. Though the Supreme Court decides a case finally it may not necessarily always decide it correctly. *Zaheer ud Din* sets up a dangerous precedent for all minorities and constitutes an alarming signal to all lovers of human rights. On the legal and Constitutional issues involved in the case the court itself was divided. "A dissent in the court of last resort, is an appeal to the brooding spirit of law; to the intelligence of a future day."[2] Very often Judges allow their dissent to go unpublished because they see no point in waging the particular battle in a given case. A recorded dissent, however, indicates that the cleavage is vital enough to pass the issue on to the future. In *Zaheer ud Din* the dissenting opinion was the leading opinion. The judgment of the Supreme Court therefore needs to be closely examined for the legal and Constitutional questions decided in the case. This is an attempt to examine the Supreme Court judgment in *Zaheer ud Din* with a view to bring out the real issues for future and further examination by the scholarly juristic opinion.

The present work has been undertaken to provide the whole background in which the controversy came before the Supreme Court. The basic issues and the question at the heart of the controversy have been spelt out. The background of various cases has been provided. Constitutional issues involved in the case in the background of Pakistani case law, have been discussed, the question of religious freedom and such basic issues as the concept and nature of fundamental rights and the

permissible limitations that can be imposed under the international standards, have been examined. The question of permissible limitations is referable to the opening clause of Article 20 of the Constitution of Pakistan, which says that the freedom shall be "subject to law, public order and morality." The interpretation of words "subject to law" was one of the main questions, which needed interpretation. Another question on which the opinion in *Zaheer ud Din* is divided is the question of overriding effect of "Islamic provisions". All these questions have been dealt with. The Supreme Court of Pakistan also relied on a good number of American cases. Those cases have been examined and discussed in the light of the well-known principles of American jurisprudence, such as secular regulation, interest weighing and neutral purpose, adopted by the American Supreme Court.

The majority opinion in *Zaheer ud Din* is deeply locked up in religious controversy and polemics, which was strictly speaking not relevant. Unfortunately, the court did not verify the facts; and accepted what was produced before the court presumably in the "post argument"[3] stage. Vicious hostile propaganda literature has found its way in the judgment of the court. When such matter is passed through the medium of a court judgment it carries with it a measure of credibility, not otherwise attached to controversial religious propaganda literature. This aspect of the judgment has rendered the judgment open to a serious jurisdictional question. The sociopolitical argument has also been examined. The argument based on religious polemics has been left out from consideration in this work. That is more appropriately a subject for an independent treatment. The effects

of the judgment and further trends and developments have been examined and finally the conclusions have been recorded.

It is the author's view that majority opinion in *Zaheer ud Din* is a deviation from established law in Pakistan; is in conflict with and falls short of international juridical standards on evaluation of guarantees pertaining to human rights.

It is hoped that this work may provide an interesting and thought-provoking study for lawyers and judges in Pakistan as also for those interested in the study of Human Rights and Islamization trends throughout the world. It is 'an appeal to the brooding spirit of law, to the intelligence of a future day'

THE PERSPECTIVE

(The Second Constitutional Amendment)

The Second Constitutional Amendment and Ordinance XX of 1984 provide the background of the legal issue, which was presented before the Supreme Court of Pakistan in *Zaheer-ud-Din,* which must be viewed in its proper perspective. The Constitution 2nd amendment Act was passed in 1974. The amendment provided that;

> "a person who does not believe in the ***absolute and unqualified*** finality of the Prophet-hood of Muhammad (peace be upon him) the last of the Prophets or claims to be a Prophet in ***any sense of the word*** or of ***any description whatsoever*** after Muhammad (peace be upon him) or recognizes such a claimant as a Prophet or a religious reformer, is not a Muslim for the purposes of the Constitution or Law".
>
> *(Emphasis added)*

> The amendment also inserted words "and persons of Qadiani group or the (Lahori group) who call themselves ('Ahmadis')" in clause (3) of Article 106 of the constitution.

To properly understand the 2nd amendment and Ordinance XX of 1984 and to judge and assess the enormity, sweep and extent of the denial of religious freedom to Ahmadis, one needs to know what Ahmadi faith or Ahmadiyyat is.

What Is Ahmadiyyat

Ahmadiyyat is not a new religion or faith nor is it a cult. The movement was founded by Hazrat Mirza Ghulam Ahmad of Qadian in 1889. He claimed to be the Mahdi and the Promised Messiah in the fulfillment of the prophecies of Prophet Muhammad(SAWS) and within the order of Islam. His claim of being *Mahdi-Messiah* aroused bitter opposition. The meaning and concept of finality of the prophethood of the Holy Prophet Muhammad(SAWS) is also a matter of controversy between the bulk of orthodox Muslims and the members of the Ahmadiyya Movement. According to Ahmadiyya perception the Movement represents the essence of Islam. "The Movement does not depart from Islam in the very least, nor does it add an iota to the doctrine and teachings of Islam. Yet, it is a fresh presentation of Islam and more particularly of the wisdom and the philosophy that underlies its teachings based upon and deriving entirely from the Holy Qur'an and pronouncements and practices of the Holy Prophet of Islam. It is not a new religion nor is it an innovation."(1)

The question came under consideration before Lahore High Court in *Shorish Kashmiri's* Case. The observations of the High Court may be reproduced with benefit.

> "The whole burden of argument of petitioner's learned counsel was that *Ahmadis* are not a sect of Islam and the petitioner's right to say so is guaranteed by the Constitution. The learned counsel overlooks the fact that Ahmadis as Citizens of Pakistan are also guaranteed by the Constitution the same freedom to profess and proclaim that they are with-

> in the fold of Islam. How can the petitioners deny to others what they claim for themselves is beyond our comprehension? Certainly not by terrorizing them. The question at the root is how far the petitioners and others like-minded can in law prevent the Ahmadis from professing that notwithstanding any doctrinal differences with the other sects of Islam they are as good followers of Islam as anybody else who calls himself a Muslim.[2]"

In *Abdur Rahman Mubashir* the Lahore High Court observed:

> "The dispute between the Muslims of Indian sub-continent and the followers of Mirza Ghulam Ahmad, who are commonly called Ahmadis or Qadianies, is not of recent origin. It is as old as the claim of Mirza Ghulam Ahmad to prophethood, despite his belief in the holy Qur'an and Sunnah.---- he tried to reconcile his claim to prophethood with his purported belief in finality of Prophethood of Muhammad(PBUH)----- He claimed that he had, though a prophet, not brought any Sharia of his own and that the appearance of a new prophet without new Shariat was not contrary to and did not detract from the doctrine of finality of prophethood of Muhammad, (Khatam-e-Nabuwwat)"[3]

Dealing with Ahmadiyya belief the court further held:

> "Except for some other minor differences the Qadianis do believe in the mission of Prophet Muhammad(PBUH), and the Holy Qur'an and the Traditions.[4]

According to a study conducted by International Commission of Jurists:

> "The Ahmadiyya Movement was founded in 1889 by Mirza Ghulam Ahmad and it has become a missionary movement with adherents throughout the world. Pakistan has always been the center of its activities and there are some four million Ahmadis in that country. Mirza Ghulam Ahmad claimed to have received revelations that in his person the Mahdi had become present and that he was also the Promised Messiah and was indeed the Prophet whose advent had been foretold in the principal religions of the world.---- In addition he claimed that contrary to the general Muslim view that Jesus Christ had been raised to Heaven alive and would descend to earth again, it had in fact been foretold that another person with Jesus Christ's attributes would appear and that he was that person. His views on the permissibility of *Jehad* were much more restrictive than those of other Muslims, although the common perception that he was in favour of a total ban appears to be incorrect. Mirza Ghulam Ahmad saw himself as having been appointed by God for the revival and support of the true faith of Islam and his followers continue to worship Allah in much the same way as other Muslims, with the faithful being summoned to prayer five times a day and the same rites rituals being followed. However, despite seeing themselves as part of the broader Islamic movement and having been treated as such under Pakistan's Constitution since independence, other Muslims have repeatedly declared the Ahmadis to be heretics."[5]

The Ahmadiyya belief as professed and practiced for more than a century, objectively viewed and analyzed by outside observers, as discovered and found by research scholars and recognized in some judicial pronouncements, is a movement within the broad spectrum of Islam. Despite their differences on theological issues Ahmadis have always been a part of the larger Muslim

community. This firmly rooted historical position, notwithstanding, the Constitutional Second Amendment Act declared Ahmadis 'Not-Muslim' for the purposes of law and Constitution.

A closer look on the *Second Constitutional Amendment* would indicate that the controversy relates only to the interpretation and true perception of one particular verse of the Holy Qur'an. This controversy was not of recent origin and was as old as the Ahmadiyya Movement itself. Attention may here be drawn to the emphasis added, in the reproduced text of the 2nd amendment, which shows that it is the interpretation of the finality of the prophethood of Muhammad(PBUH), which is the basis of the amendment, NOT the Islamic practices.

AFTER THE 2ND AMENDMENT

Though the Constitution classified Ahmadis as not-Muslims it did not restrict or impair their religious beliefs or practices in any manner. No criminal actions were brought against Ahmadis as a result of the Constitutional amendment. The clergy, however, did make attempts to restrict the Ahmadi practices and to deprive them of their Muslim character and identity. A number of civil suits were filed in various parts of the country seeking declaration and injunctions that Ahmadis be restrained from building their places of worship, structurally similar to and bearing resemblance to the Muslim mosques, restraining them from calling Azan and offering Muslim prayers. In the province of Punjab a large number of such suits were transferred from various districts to the High Court of Lahore. One such case related to Dera Ghazi Khan District and was entitled *Abdul Rahman Mubashir versus Amir Hussain Bokhari.* Division Bench with Justice Aftab Hussain as the senior judge heard the case.

Abdul Rahman Mubashir:

In the case of Abdul Rahman Mubashir the Court summarized the plaintiffs' claim in the following words:

> It is alleged in paragraph No. 2 of the plaint that the defendants' place of worship is known as a mosque (Masjid) and they perform prayer in it which resembles the prayer in Shariat and includes *Azan, Namaz, Qyam, Sajood, Ruku'*, reading of the Qur'an, saying Darood-o-Salam on the Holy Prophet and

> invoking benediction (دعا). It is further alleged in paragraph No. 5 that a mosque is a place of worship which is exclusive for the Muslims and no infidel has a right to construct it or to make his places of worship resemble it (mosque) in any manner or make his place of worship face Ka'ba. A mosque in short is inaccessible in Islam to those beyond its pale. Similarly, Namaz and other modes of prayer are provided only for Muslims. No non-Muslim can carry on prayer in the manner in which the Muslims perform them. Namaz is also a *Shiar* that is a rite and a ceremony exclusively reserved for the Muslims and a person calling the Azan consequently must be a person belonging to the Islamic faith."[1]

The Lahore High Court in that case held that the contention was not supported by any Qur'anic injunction, tradition, or opinion of Imams (i.e., the founders of the different juristic schools of thought). The Court held that Islam is a religion of tolerance leaving non-Muslims free to profess and practice their religions. The Court repelled the contention that non-Muslims could not construct their places of worship in any manner resembling a mosque, or call it by name of Masjid, or say Azan in it, and perform his prayer in it in same manner as ordained for Muslims. The Court also held that there was nothing objectionable in worship of One God in manner taught by the Prophet of Islam, and that it gave no cause of action to Muslims' [2]

The Court did not "accept" the contention that the adherents of any particular religious sect are at liberty to prevent the adherents of another religious sect from carrying on religious procession or from assembling for public worship in public streets on the ground that such

worship had not hitherto been carried on and that it was opposed to their religious feelings. And held that "it would be unreasonable to allow one sect or class to exclude another on the ground that by the performance of certain rites they have appropriated a public street, or any portion thereof, for their religious processions or worship."'[3]

Dealing with another argument the court observed:

> "The learned counsel for the respondents argued that to allow the non-Muslims to offer prayer and to call Azan is an interference with شعائراسلام . I agree that these are شعائر but I am unable to appreciate that adoption of these شعائر by non-Muslims is interference with them. They are as good شعائر for the Qadianis too since they consider them necessary as a matter of conscience to perform the duty of obedience to Allah."[4]

Sh. Ghias Muhammad while arguing on behalf of plaintiff/respondent referred to an Indian case *Saifuddin Saheb v. State of Bombay'* and argued that preservation of continued existence of a denomination is also a civil right and continued existence of Islam pre-supposes that the dissidents may be excluded from the place of worship of that religious denomination. The Indian case dealt with ex-communication and its consequences and had declared a law, depriving a religious body of its right to ex-communicate its members, as ultra vires under Articles 25 and 26 of the Indian Constitution. Sh. Ghias Muhammad wanted to infer from this case that for maintaining the continued existences of a denomination it is legally justifiable not only to exclude the dissidents but also to restrain them from carrying out their prac-

tices.' Repelling this argument the court observed that

> "The authority 'deals only with the right to preserve continued existence of a denomination by excommunicating the dissidents and excluding them from its place of worship. It does not confer any right on such denomination to interfere with the mode of worship of the ex-communicated dissident or with the place of worship constructed separately by him. It does not give any right to the denomination, after passing the order of excommunication, to have anything to do with the manner in which the ex-communicated dissident performs religious rites of worship according to his conscience."[5]

The court found that Islam leaves non-Muslims free to profess and practice their religion and enjoy complete autonomy in regard to their religious tenets and injunctions.' [6]

Reaching the heart of the controversy the court observed that:

> "Except for some other minor differences the Qadianis do believe in the mission of Prophet Muhammad(PBUH), and the Holy Qur'an and traditions. In this view they call their places of worship as Masjid, they perform prayers (Namaz) in the manner ordained for the adherents of Qur'an and call their congregation to prayer by shouting Azan. The prayer in the plaint that they should be barred from constructing their mosque as facing Ka'aba or by imitating the construction of Muslim mosque or calling Azan or offering their prayers in the manner of Muslims and performing رکوع prostration سجدہ and Tash'had will amount to interfering with their religion, which Islam, as a religion of tolerance does not allow. On the other hand Islam leaves the non

> Muslims free to profess and practice their religion لکم دینکم ولی دین "[7]

Dealing with the question whether the Islamic principles of justice, equity and good conscience could be applied to non-Muslims or Qadianis, the court observed that:

> "Although the Islamic Law cannot be applied to non-Muslims in general, my answer to the above question would be in the affirmative. The reason is that like Muslims, this section of non-Muslims claims to be bound by the Law of Qur'an and Sunnah. In such circumstances, I have no manner of doubt left that at least those non-Muslims who profess to be bound by the same Law as the Muslims, will also be bound by similar principle of justice, equity and good conscience. Consequently, the Muslim Law shall apply to them."[8]

This judgment of the Lahore High Courtwas not challenged before Supreme Court and became final. It was thus established that notwithstanding the argument based on *sharia*, such claims to restrain Ahmadis from Muslim practices were in conflict with fundamental rights and could not be justified either under the Constitution or under Islam. That settled the controversy for a while.

HEART OF THE MATTER

"There is a Constitution higher than any statute. There is a law higher than any Constitution, it is the law of the human conscience, and no man who is a man will defile and pollute his conscience at the bidding of any legislature. Above all things, one should maintain his self-respect, and there is but one way to do that, and that is to live in accordance with your highest ideal."(1)

-Robert G. Igersoll(P-9)

In the year 1984 Gen. Zia ul Haq, the Martial Law Dictator, in an attempt to seek legitimacy for his Martial Law Rule and with a desire to whip up fundamentalism, issued Ordinance XX whereby two new sections, 298-B and 298-C, were added to the Pakistan Penal Code. Prayer-call Azan was prohibited for Ahmadis; preaching and propagating their faith, calling their faith as Islam or posing themselves as Muslim were made punishable with three years imprisonment and unlimited fine. Certain words and epithets were also proscribed (The text of the Ordinance may be seen in Appendix-I). The Ordinance *ex-facie*, violated the religious freedom guaranteed under Article 20 of the Constitution which reads:

> Subject to law, public order and morality,--
>
> (a) Every citizen shall have the right to profess, practice and propagate his religion; and
>
> (b) Every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

In the Constitution of Pakistan, the right of religious freedom guaranteed under Article 20 has been assigned a greater sanctity and has a higher dignity than the other fundamental rights. Article 20 of our Constitution cannot be suspended even under emergency declared under Article 232 of the Constitution. Rights guaranteed under article 20 are, therefore, non derogateable rights.

The controversy before the Supreme Court in *Zaheer ud Din vs. The State* related to fundamental right of religious freedom. All fundamental rights by their very nature and definition are considered to be limitations not only on the majority will but also on the state authority.

James Madison observed:

> "Before any man can be considered as a member of civil society, he must be considered as a subject of the governor of the universe: And if a member of civil society, who entered into any subordinate association, must always do it with reservation of his duty to the General Authority; much more must every man who becomes a member of any civil society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of religion, no man's right is abridged by the institution of civil society and that religion is wholly exempt from its cognizance."(2)

Conceptually, therefore, fundamental rights are the freedoms reserved in the initial social contract. The individ-

uals do not surrender their relationship with God and the state is only entrusted and delegated the authority to regulate the secular and mundane affairs of the society. It is for this reason that religious freedom enjoys such a high status in every Constitution. The chapter relating to fundamental rights in any Constitution, is therefore a declaration that the citizens reserve unto themselves the subjects mentioned in the fundamental rights and the state undertakes not to interfere in those realms. In this view of the matter the fundamental rights must be regarded inviolable. In *Fletcher vs Peck*, Justice Johnson observed:

> "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things; A principle that will impose laws even on the Deity." [3]

Seen as a part of the social contract, in the first place, religious freedom has not been surrendered to the state authority. In the alternate even if it be considered that fundamental rights are the grants of the state, the same cannot be revoked. The legislature has no right to take away those rights.

When legislature undertakes to restrict or override religious beliefs, it runs head-on against a great affirmative principle expressly declared by Article 20 of the Constitution of Islamic Republic of Pakistan. It is a universally acknowledged principle that where legislative abridgement of fundamental right is asserted the court should be astute to examine the effect of the challenge of legislature.[9] Mere legislative preference or

beliefs respecting matters of public convenience may well support regulation directed at other personal activities but insufficient to justify such as diminishes the exercise of rights so vital.'[10] The presumption should be against the validity of any Statute abridging the religious freedom.' However, in deciding the case of Ahmadis, the majority opinion of the Supreme Court of Pakistan departed from these principles and validated such a law in *Zaheer ud Din and others versus the State.*

The Supreme Court judgment marks an alarmingly invasive interpretation of the Constitutional guarantee of religious freedom. As a result religious freedom has become vulnerable to serious erosion. This, then is the heart of the matter which we are about to examine with its full background in the pages to come.

ON THE WAY TO SUPREME COURT

Challenge Before The Shariat Court

The conflict between the Ordinance XX of 1984 and the fundamental right was apparent and manifest. But the country was then under Martial Law and the fundamental rights stood suspended. However, General Zia-uI-Haq, had introduced chapter 3-A in the Constitution by Constitutional amendment order P.O. No. 1 of 1980 establishing Federal Shariat Court which could strike down any law as being repugnant to Qur'an and Sunnah. The article 203-D reads:

> "203-D. (1) The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Qur'an and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam."

In sub-article (2) it was further provided that:

> "If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:
>
> (a) the reasons for its holding that opinion; and
>
> (b) the extent to which such law or pro vision is so repugnant;"

and also provided that:

> If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam:"

and that:

> "Such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect."

Immediately on the promulgation of the Ordinance XX, some Ahmadi individuals challenged the Ordinance before the Federal Shariat Court for declaration that the Ordinance was against the Islamic injunctions of Qur'an and Sunnah.

It was contended that:

(a) The Ordinance violated the letter and spirit of Qur'anic injunctions about freedom of conscience and religious liberty.

(b) Qur'an and Sunnah do not justify any compulsion in the matter of faith.

(c) What has been declared to be lawful by Qur'an and Sunnah cannot be declared unlawful by State authorities and that the acts declared laudable and commendable by Qur'an and Sunnah cannot be made criminal offences punishable under law.

(d) There is nothing in the Qur'an and Sunnah to

stop a non-Muslim from believing in and declaring the unity of Allah or to acknowledge the Holy Prophet of Islam to be truthful in his claim or to adopt the teachings of Qur'an as a code of life or to act upon the injunctions of Islam if he voluntarily so chooses.

Mujeeb-ur-Rahman & Others
vs
The Federation Of Pakistan

The Federal Shariat Court lost no time in taking up the case and took up the case during the vacation. At the time Justice Aftab Hussain, who was the author of the judgment in Abdur Rahman Mubashir case, was the Chief justice of Federal Shariat Court. A full court comprising of five judges including two Ulema heard the case for more than 14 days at a stretch. There were lengthy arguments on both sides. The court dismissed the petition by a short order which reads:

> "1. The allegation in the two petitions as elaborated at the Bar that the impugned Ordinance violates the freedom of faith of the Qadianis of either persuasion and restrains them from practicing their religion or affects their right of worship is not correct. The said Ordinance does not interfere with the right of the petitioners or other Qadianis to profess and practice their religion in accordance with the provisions of the Constitution and the Injunctions of the Holy Qur'an and the Sunnah. They are at liberty to profess Qadianism or Ahmadism as their religion and to profess their faith in Mirza Ghulam Ahmad of Qadian as a Prophet or the Promised Messiah or the Promised Mahdi. They are also at liberty to practice their religion and worship inter alia in their places of worship according to the tenets of their religion.

> 2. The impugned Ordinance is consequential to the Constitutional Amendment of 1974, by which the Qadianis, whether belonging to the Lahore Group or others were declared non-Muslims in accordance with the dictates of Islamic Sharia. In implementation of the Constitutional fiat, which was disregarded with impunity by the Qadianis, they have been restrained by the impugned Ordinance from directly or indirectly calling or posing themselves as Muslims or calling their faith as Islam. To call their places of worship by the name of Masjid (Mosque) and to call people to prayers by calling Azan which (name for the place of worship and method for calling people to prayers) are exclusive for the Muslims and distinguish Muslims from non-Muslims, amounts to posing as Muslims. By the said name and the said call to prayers the unwary among the Muslims are likely to be deceived and to offer their prayers behind a non-Muslim Imam in a non-Muslim place of worship. The prohibition against calling their places of worship as Masjid or calling Azan for prayer is thus consequential to the declaration of the Ahmadis or Qadianis as non-Muslims or prohibition against posing them as Muslims. The Qadianis can call their places of worship by any other name and call the adherents of their religion to prayer by use of any other method. This does not amount to interference with the right to profess or practice their religion." [1]

While the draft of the detailed judgment was being circulated among the judges the Chief Justice of Federal Shariat Court was transferred to work as Advisor to the Ministry and on his refusal to accept the position stood retired by virtue of Article 203-C(b) of the Constitution as amended by Gen. Zia-uI-Haq.

The detailed judgment was thus signed by four judges and made no mention about the fate of the fifth Judge.

The judgment attracted the following comment from International Commission of Jurists:

> "In Mujeeb-ur-Rehman vs. Federation of Pakistan Ordinance XX (which prohibits Ahmadis from calling themselves Muslims) was challenged before the Federal Shariat Court as being repugnant to the Qur'an and Sunnah. The case was heard by the judges and a 'short order' announcing the determination by the five judges was made in August 1984, with reasons to be given at a later date. The Chief Justice who presided at the hearing was Mr. Aftab Hussain, By the amendment to Article 203-C(4B) with effect from 2 March 1985, the President was empowered to assign a judge to any other office or perform such other functions as the President deems fit. As described earlier, Mr. Aftab Hussain was asked to accept appointment as Advisor to the Ministry of Religious Affairs. He declined, and was deemed to have retired. The judgment of Rehman's case was later delivered and reported, by four judges only. There is no reference to the fact that five judges heard the case and made a preliminary determination."[2]

The Chief Justice who was unceremoniously sent home during the period when he was to hand in the detailed judgment in the case, subsequently went on record and stated that Zia-ul-Haq had tried to have his judgment changed.

Justice Aftab stated that after a tour of Sudan he was staying in Saudi Arabia for Umra where he received the information that he had been relieved from the Federal Shariat Court and had been appointed as an Advisor to the Ministry of Religious Affairs. On his return to Pakistan he declined to accept this position.

At the hearing before the Federal Shariat Court the present author argued the case of the petitioners and contended that the function of Federal Shariat Court was to remove repugnancy of any law with the Qur'an and the Sunnah of the Holy Prophet (P.B.U.H.). The court accepted the proposition of the petitioner and said:

> "There is hardly any cavil with this argument of Mr. Mujeeb-ur-Rehman."[3]

It was also argued that what the Qur'an and the Sunnah has declared as lawful could not be made unlawful by the State. The present author laid stress on the necessity of ignoring *Taqleed* and reaching directly the text of Qur'an and Sunnah to discover a rule of law. The court accepted this position and reassuring the petitioners observed:

> "The Court also held in the case of Muhammad Riaz etc. Vs. Federal Government etc. (1) that in public law it was not bound by the doctrine of Taqleed. This is sufficient to assuage the apprehensions of Mr. Mujeeb-ur-Rehman."[4]

On the question of freedom of belief and right to practice one's religion, the present author formulated some questions to direct the attention of the court to the basic issue involved. In the language of the court these questions were:

> 1. Does Islam entitle and allow a non-Muslim to declare the unity of Allah?
>
> 2. Does Islam entitle a non-Muslim to acknowledge the Holy Prophet (P.B.U.H.) as truthful in his claim?

3. Does Islam entitle a non-Muslim to acknowledge the Qur'an as furnishing a good Nizam-e-Hayat i.e. way of life and to treat it as worthy of obedience?

4. Is this permissible or not for a non-Muslim to act upon the Injunctions of the Holy Qur'an if he so likes?

5. If the answer be in the negative where is the Injunction in the Qur'an and the Sunnah in support of this negation?

6. What course of action does the Qur'an propose or provide for a person who is not considered Muslim nor has any right to be so considered by believers, in the truthfulness of Qur'an, in the Prophet-hood of Muhammad Rasoolullah (P.B.U.H.) and the oneness of Allah.[5]

Dealing with these questions, the court observed:

"The first four questions posed by Mr. Mujeeb-ur-Rahman have to be answered in the affirmative. There is no bar--Constitutional, legal or Sharai against the right of a non-Muslim to declare the unity of Allah, to acknowledge the Holy Prophet (P.B.U.H.) as truthful in his claim, to acknowledge the Qur'an as furnishing a good way of life and to act upon its Injunctions. The 5th question does not arise in view of the affirmative answer of the 4th question. A clear answer to the 6th question is that such a non-Muslim is to be dealt with like other minorities, subject to the conditions imposed by the Qur'an and the Sunnah which shall be considered at the appropriate place."[6]

The court was clear and categorical in its finding that:

"The Muslim Sharia affords full protection to the practice of religion by the non-Muslims as well as to its profession."(7)

And further that

"Islam teaches absolute tolerance in matters of religion and leaves it to the conscience of a man to accept the religion of Islam. No compulsion in this respect is allowed in Islam."[8]

Having accepted all these arguments the court observed that:

"All these arguments are however hardly relevant since the impugned law does not force the Qadianis to change their belief and to be converted to Islam."[9]

About the epithets the court observed:

"The provisions banning the use of these epithets and expressions is 'in implementation of the Constitutional provision and a consequence of the reiteration in this Ordinance of the principle that Qadianis cannot call themselves or pose to be Muslims in any manner directly or indirectly."[10]

Dealing with the ban on Azan the present author mainly relied upon verses 5:2 and 41:33 of the Holy Qur'an. In the verse 5:2 "best of utterance refers to *Azan*, which cannot be made punishable. It was further argued that if a religious practice is common between Muslim and non-Muslim it cannot be denied to non-Muslim and that according to Qur'anic mandate Muslims are required to cooperate with non Muslims in such matters. It was also argued on the authority of Qur'anic text that sacred rites are not to be desecrated or defiled just because non-Muslims wish to carry them out. Azan was such a

sacred rite. It was also argued, again on the authority of Qur'anic text, that Muslims should cooperate with non Muslims on the basis of a common denominator.

Confronted with the thrust of the argument based on the unimpeachable Qur'anic text at one stage the Counsel for the Federation found no escape but to argue that the particular portion of the verse of the Qur'an stood repealed. The court noted these arguments and referring to Verse 5:2 the Court observed:

> The question is whether Shia'ar (signs) of Allah referred to therein were the characteristics or signs of the polytheists or they were of Muslims. Mujeeb-ur-Rehman quoted authorities from the opinion of the commentators for supporting the view that the characteristics or Shaa'ir referred to in this verse were of the polytheists but Mr. Riazul Hasan Gilani relied upon the other set of opinions. The opinion of Pir Muhammad Karam Shah, now a Judge of the Supreme Court Shariat Bench in his well-known commentary Ziaul Qur'an favours the opinion of Mr. Mujeeb-ur-Rahman."[11]
>
> "There are some views that this verse has been abrogated."[12]

The court did not record any finding as to which of the two contending views prevailed with the court. Nor did it record any reason either for accepting or for rejecting one view or the other and felt content merely with the recording of the two views. The inference is obvious. The petition was nevertheless dismissed and it was held that:

> "In view of verse 9:28 and the rules emanating from it non-Muslims can be 'stopped from pursuing a Shia'ar which is common among Muslim and non-Muslims." and further observed that "the Azan by a non-Muslim is not covered by the expression 'best of utterance' (حسن قول) and if "a person can be restrained from that Shia'ar he can also be punished for violation of the restrained order."[13]

The present author based his argument about the right to preach and propagate on the Qur'anic text and cited a large number of classical and modern commentaries of Qur'an to support his contention. Referring to the present author's contention the court observed:

> "It is not necessary to reproduce them as the meanings of these verses are clear that the Muslims can ask the Polytheists and non-Muslims to give argument in favour of their strong belief."[14]

The court further observed:

> "But Mr. Mujeeb-ur-Rahman's argument is that this gives the non-Muslims a right to preach his religion to convert them. We do not agree with this even as a remote possibility."[15]
>
> "All these verses relate to the principles of *Tableegh* or propagation of Islam and the manner and method to be used for such propagation. The principle is that when talking to a non-Muslim for the purpose of propagating Islam one should be gentle and polite and should not only demonstrate logically and rationally all good points in Islam but also let the non-Muslim place his view about the good points in his own religion before him. It is necessary that a view point of the non-Muslim about his own religion should be plainly put forward so as to enable Muslims to refute them and to demonstrate the superiority of Islam over the conceptual philosophy of the other religion. In fact the Qur'an does not only allow such free discourse among two persons but

> asks the Muslims to challenge the non-Muslim to bring forth the arguments in favour of his belief as is clear from the word هاتوا برهانكم (bring your arguments), which is suggestive of the inability of the non-Muslims to give any such argument."[16]
>
> "These verses and commentaries also are not sufficient for holding in favour of the fundamental rights of non-Muslims to propagate and preach their religion among Muslims. Despite this it is for the Islamic State to allow the non-Muslims to preach their religion as has been done in Article 20 of the Constitution but this can be allowed if the non-Muslims preach 'as non-Muslims and not by passing off as Muslims. It is for the legislature to lay down other conditions also."[17]

The court finally held:

> "As a result of the declaration which was the result of a unanimous demand of the Muslims it was not possible for the Qadianis to call themselves Muslims or to propagate Islam of their concept as true Islam but they showed the least respect for the Constitutional Amendment and continued as before to call their faith as Islam."[18]

In short, the court accepted the contention that the case was to be decided on the basis of Qur'an and Sunnah, and not on the basis of *taqleed*, the court had also no cavil with the principles of interpretation. The court also accepted the freedom of conscience and religion granted by Islam. The four out of six questions posed by the petitioners were also answered in the affirmative. On one point there was no escape but to resort to the enormity of declaring a verse of Qur'an to have been abrogated and yet the court dismissed the application. because the Constitutional amendment was "the result of unanimous demand of Muslims" and "it was not possible for the Qadianis to call themselves Muslims or to propagate Islam of their concept as true Islam."

An appeal was filed from this judgment before the Shariat Appellant Bench of the Supreme Court which was taken up in the year 1990. In the peculiar circumstances*the appellants felt constrained to withdraw the appeal. The appeals were allowed to be withdrawn by the Supreme Court. The learned Chief Justice observed:

> "Coming to the appeals before us, as indicated already, the appellants challenged the impugned law before the Federal Shariat Court on the touch-stone of 'Islamic Injunctions'. It has the jurisdiction under article 203-D of the Constitution to declare it as repugnant to them, ***as distinguished from jurisdiction by the other superior courts to annul a law on the ground of repugnancy to a fundamental right, as guaranteed under the Constitution.***'" (emphasis provided). The matter was thus left to be resolved on the touch-stone of the Constitutional Law.[19]

Challenge on Constitutional Grounds

The Ordinance XX of 1984, was in conflict with the fundamental right. Soon after the promulgation of the ordinance it was also challenged under Constitutional jurisdiction in the High Court. Two such petitions were filed in the Lahore High Court.

Muhammad Aslam
vs.
Federation of Pakistan

One Mohammad Aslam of district Kasoor challenged the Ordinance in Writ jurisdiction and contended that:

> The ordinance XX was in violation of the Constitution. The power of the President was subject to the same restrictions and limitations as the powers of the parliament to enact laws. Since the parliament could not make a law in violation of fundamental rights, the president also could not promulgate an ordinance in violation of fundamental rights. The Ordinance prohibits the petitioners to profess and practice their religion, which enjoins daily prayers in a mosque. The congregation is called by Azan calling the worshipers to join in congregation. The Ordinance prohibits azan as well. This was in violation of fundamental right guaranteed by Article 20 of the Constitution. The petitioner also relied on Article 227(3) of Pakistan Constitution, which article had been incorporated even in the provisional Constitution order issued by the Martial Law Administrator. The petitioner also contended that the ordinance violated the Universal Declaration Of Human Rights to which Pakistan was signatory. It was also contended that the Ordinance was discriminatory in nature and further that it criminalized and punished Islamic practices by calling them un-Islamic. It was also contended that the Ordinance was tainted with malice of the Martial Law Administrator which had found expression in his public speeches.[1]

Mujeeb ur Rahman Dard
vs.
Federation of Pakistan

Another person by the name of Mujeeb ur Rahman Dard also challenged the Ordinance under Writ jurisdiction on similar grounds. These two Writ Petitions were dismissed by a single Judge of Lahore High Court mainly on the ground that in view of Article 203-G the matter fell within the exclusive jurisdiction of Shariat Court and the High Court could not entertain the petitions to examine the Constitutional vires of the ordinance.

Intra-court appeal was filed against this judgment and the two cases came up before the Division Bench of Lahore High Court. The Division Bench in the intra-court appeal did not accept the view of the single judge about the interpretation of Article 203(G) of the Constitution of Pakistan and held that

> "if a question arises whether a law is valid on a ground other than that of repugnancy to the injunction of Islam, article 203 G will not stand in the way of the High Court from examining it."[2]

On the question of invalidity of the ordinance on the ground of repugnance to the Constitution, the Division Bench held that

> "if Constitution of 1973 had been in force in its entirety the argument of the appellant would have been worth examination but this is not so, for three supra Constitutional documents have since July 1977 eclipsed the Constitution. The first in the context is the proclamation of Martial Law which became effective on the 5th of July 1977. It placed the Constitution in abeyance. The second is the Chief Martial Law Administrator's Order No. 1 of 1971, also known as the Laws (Continuance in Force) Order 1977. Although clause (i) of Article 2 of this Order inter alia did state that Pakistan would be governed as nearly as may be in accordance with the Constitution but then clause (iii) of the same Article placed all Fundamental Rights under suspension. The third document is the Provisional Constitution Order, 1981, promulgated on the 24th of March, 1981, Article 2 of this order has adopted certain provisions of the Constitution of 1973, it is significant to note that the adopted provisions do not include any of the Fundamental Rights, including Article 20 upon which the appellants rely. Thus the said Article like all other Fundamental Rights is not enforceable at present."[3]

This judgment was challenged in appeal before the Supreme Court of Pakistan and Leave to Appeal was granted in this case to examine the question whether Ordinance XX violated the fundamental right guaranteed under Article 20 of the Constitution.

Zaheer ud Din and Others
vs.
The State

The text of the Ordinance was bad enough but its application was worse. A large number of prosecutions

of Ahmadis were started under garb of this Ordinance--section 298(C). These criminal cases came up before courts and a good number of cases resulted in convictions and appeals were brought against the conviction orders.

In the province of Baluchistan, five Ahmadis were charged under section 298(C) for wearing badges of *Kalima Tayyeba* and were convicted and sentenced to terms of imprisonment. Their appeals before the Sessions failed and a Revision Petition was filed in the High Courtof Baluchistan. In the Revision Petition amongst other things it was contended that *Kalima Tayyeba* has not been expressly mentioned in section 298-C and therefore conviction for displaying a badge of *Kalima Tayyeba* was illegal. The Constitutional vires of Section 298-C was also challenged on the ground that it violated the guarantee of religious freedom. It was also contended that on the principle of strict construction of criminal statutes the offence under 298-C could not be extended to what is not specifically mentioned in the section. It was further contended that in the background of *Abdul Rahman Mubashir* it must be assumed that the omission to mention *Kalima Tayyeba* was deliberate and purposeful. The legislature was fully aware that *Kalima Tayyeba* is cardinal to Ahmadiyya belief. It was also contended that the word 'pose' in Section 298-C was too vague and overbroad and was therefore void. Alternately it was argued that the word 'pose' must be assigned a definite and restricted meaning. It was argued therefore that article 'or' used several times in section 298-C had been used mostly in explanatory, illustrative and stipulative sense. Law Lexicons were cited in support of this contention. An attempt was thus made to restrict the

application of section 298-C.

Professor Antonio R. Gultaire who was visiting Quetta about the same time when the case was being argued in Baluchistan High Court recorded his impressions in his book 'Conscience and Coercion' It may be useful to reproduce a small para from the book.

> "It is under the foregoing Section 298(c) that most of the Ahmadis arrested have been charged and imprisoned. On the surface it is so incredibly unreasonable and malevolent that I analyzed it at length to see if it could be interpreted in a milder light so as to soften some of its deleterious impact on the Ahmadis (and, implicitly, on one's judgment of the present-day Pakistani justice system). I discovered, subsequently, that Mujeeb-ur-Rahman, one of the principal advocates for the embattled Ahmadis had in fact submitted an appeal to the High Courtat Quetta in which he argued (in far more adequate legal fashion) some of the same points. Though the arguments would not have abrogated this pernicious anti-Ahmadi legislation, they would have served to reduce the number of specific charges under which Ahmadis could be prosecuted."[4]

Dealing with the submissions of the present author, the court formulated the moot question "Whether by wearing a badge of *Kalima Tayyeba* the petitioners who were Qadianis have committed an offence within the meaning of section 298(C) PPC." The court examined the argument based on interpretation of statutes and noted the case law cited at the bar and the arguments advanced at the hearing. Interpreting Ordinance XX in the historical background and with reference to the pre amble the court observed:

on the walls and wall-writings;
viii. Distribution of sweets and service of food
ix. Any other activity directly or indirectly which may incite and injure the religious feelings of Muslims.

Mirza Khurshid Ahmad and others challenged this prohibitory order in the High Court by a Writ Petition. The challenge was made on the ground that under the code of criminal procedure the resident magistrate could not pass a prohibitory order of this kind and in any case any such order could not, under the text of the law, remain operative for more than two months. It was also contended that the order of the District Magistrate violated the fundamental right of religious freedom. The pivotal question addressed was purely legal and Constitutional one i.e. whether the centenary celebrations and the activities prohibited could be banned under section 144 Cr.PC.

A learned single Judge of the Lahore High Court dismissed the Writ Petition which was reported as *Mirza Khurshid Ahmad and others versus the province of Punjab* (PLD 1992 Lahore page 1). This judgment was also challenged in the Supreme Court and leave to Appeal was granted. The case of Mirza Khurshid Ahmad was also ordered to be heard along with other cases involving the same Constitutional questions.

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The State

In the mean time certain other developments also took place, which may be mentioned. *Mirza Khurshid*

Ahmad's case set up a new trend in the persecution of Ahmadis and threw a very wide net for their prosecution under section 295-C PPC, which is punishable with death. The High Court in this case had made observations to the effect that when Ahmadis recite *Kalima Tayyeba* they commit an offence NOT under 298-C PPC but under 295-C PPC. As a result cases under 298-C PPC started being converted into ones under 295-C PPC. At Nankana Saheb the local court converted a case registered under 298-C PPC into 295-C PPC on allegations of issuing invitation card for marriage. The matter was taken to High Court for grant of bail. The bail was refused by a judge of the High Court, who went a step further than the case of *Mirza Khurshid Ahmad* and held that when Ahmadis invoke blessings on the Prophet Muhammad PBUH by reciting traditional *Darood* they commit an offence under section 295-C PPC.

Thus according to Baluchistan High Court the displaying of *Kalima Tayyeba* was covered under the clause of "posing." Then according to Khalil ur Rahman J. of the Lahore High Court in *Mirza Khurshid Ahmad* the *Kalima Tayyeba* instead of being an evidence of "posing" as Muslim became blasphemous under 295-C for inwardly attributing a different meaning to the Kalima. Now according to Nazir Akhtar J. of the Lahore High Court the blasphemy was extended to invoking the blessing on the Holy Prophet.

The case of Nankana Saheb was taken to Supreme Court. The Supreme Court while disposing of the bail matter observed that

"ex-faci, use of these expressions does not create in a Muslim, or for

that matter anyone else, any feeling of hatred offence or provocation etc. etc. nor is it derogatory to the holy prophet Muhammad (Peace Be Upon Him) or the Muslims". [7]

The court further observed that

> "it is only when the person reading or hearing them goes deep into the background of the persons using them and brings his own special knowledge of the faith, beliefs and latent intentions of such an accused that the alleged result is likely to follow."[8] (emphasis added)

This is how the denial of human rights to Ahmadis reached the Supreme Court and it was in this background that the appeals arising out of the Constitutional challenge by Muhammad Aslam and Mujeeb-ur-Rahman Dard, 5 criminal appeals from Quetta and the appeal arising out of Mirza Khurshid Ahmad's case was taken by the Supreme Court of Pakistan and disposed of by split judgment in *Zaheer-ud-Din*, which is the subject matter of present study.

In The Supreme Court

At the Supreme Court hearing the case on behalf of the Ahmadis was mainly argued by Justice (Retired) Fakharuddin G. Ibrahim. His contentions were summed up in the minority judgment in the following words:

> "Mr. Fakhruddin G. Ebrahim, Senior Advocate, the learned counsel for the appellants in six Criminal Appeals (No. 31-K to 36-K/1988) has mainly taken up the Constitutional vires of the Ordinance XX of 1984. According to him, Ordinance XX of 1983 [sic*] is oppressively unjust, abominably vague, perverse, discriminatory, product of biased mind, so malafide, and wholly unConstitutional being violative of Articles 19, 20 and 25 of the Constitution. According to the learned counsel the Constitution, having by its second amendment categorized the Qadianis and Ahmadis as non-Muslim, by clause [3] of Article 260 proceeds further to distinguish from among non-Muslims the Qadianis and Ahmadis with a view to impose on them prohibitive restrictions, on their religious practices, utterances and beliefs. According to the learned counsel, 1790 criminal cases have been registered against this specific minority upto 1992 and are pending in Courts; 84 for offering daily prayers, 691 for use of *Kalima Tayyeba*, 36 for reciting Azaan, 251 for preaching religion, 676 for posing as Muslim, 52 for using Arabic expressions like "السلام علیکم", "نصر من اللہ", "میلاد النبی", etc. This according to the learned counsel amounts to a serious inroad on the right of speech, on the right to profess and practice one's religion and amounts to serious discrimination. The practices for which this minority is being prosecuted have been declared to be religious practices of the minority and permissible both under the Constitution and the law as held in *Abdur Rahman Mobashir* and 3 others v. Syed Amir Ali Shah Bokhari and 4 others (PLD 1978 Lahore 113), *Mujeeb-ur-Rehman* and 3 others v. Federal Government of Pakistan and another (PLD 1985 Federal Shariat Court 8 at pages 89 and 93). In addition, the learned counsel contended that Enforcement of Shari'ah Act, 1991 (Act X of 1991) permits the non-Muslims to practice their religion. He has also drawn our attention to Article 233 of the Constitution to emphasize that Article 20 of the Constitution is one of those provisions of the Constitution which cannot be suspended even during the emergency." [1]

Adverting to other contentions of the learned counsel the minority opinion observed:

> "The learned counsel has also explained the limited meaning which has been given to the expression "subject to law" used in Article 20 of the Constitution in the decision of the Supreme Court in Jibendra Kishore Achharyya Chowdhury and 58 others v. The Province of East Pakistan and Secretary, Finance and Revenue (Revenue) Department, Government of East Pakistan (PLD 1957 SC 9 at page 41), and Sarfraz Hussain Bokhari v. District Magistrate, Kasur and others (PLD 1983 SC 172). On the question of vagueness of the law and the specious meaning that can be given to the expression "posing as a Muslim", the learned counsel has referred to Crawford's "Statutory Construction--Interpretation of Statutes", page 339, 5. 198, Haji Ghulam Zamin and another v. A.B. Khondkar and others (PLD 1965 Dacca 156 at page 180), K.A. Abbas v. The Union of India and another (AIR 1971 SC 481 at page 497) and State of Madhya Pradesh and another v. Baldeo Prasad (AIR 1961 SC 293)."[2]

The criminal matters were argued by the present author.

His contentions were briefly summed up in the minority judgment in the following words:

> "Mr. Mujeeb-ur-Rahman, Advocate, the learned counsel for the appellants in Criminal Appeals has dealt with the interpretation of the provisions of the Ordinance XX of 1984 with a view to exclude the criminal cases that were registered for wearing badges of *Kalima Tayyeba*. His argument on the subject is that this law had its background in the decision of the Lahore High Court reported as Abdur Rahman Mobashir's case (PLD 1978 Lahore 113). Recital of *Kalima Tayyeba* or for that matter wearing of a badge of *Kalima Tayyeba* was considered to be one of permissible practices of the Qadianis and in the law under consideration it has not been expressly excluded. He has invoked, therefore, the principle that express mention of certain practices for making them an offence would certainly in criminal statute imply necessarily the exclusion of all others not expressly mentioned."[3]

The argument was supported by a large number of precedents, which were taken note in the minority opinion. Dealing with word 'pose' in section 298-C it was contended that the article or in this section is illustrative and stipulative. It was thus contended that the offence of posing was only restricted to the case of an Ahmadi if he calls his 'faith as Islam or refers to his faith as Islam or calls himself a Muslim.

THE MINORITY VIEW

Dealing with the centenary celebration case where the order of the District Magistrate had been challenged, the minority judgment held:

> "There is no authority possessed by the Assistant Commissioner, the District Magistrate, the Resident Magistrate or the Home Department of the Government to extend indefinitely till further orders an order passed under Section 144, Cr.P.C. This part of the order recorded by the Resident Magistrate referring to an order by the Assistant Commissioner had to be declared as without lawful authority and of no legal effect. None of the counsel appearing at the hearing, not even the Advocate-General, has been able to sustain this order recorded by the Resident Magistrate. Hence, the Appeal (Civil Appeal No. 412 of 1992) is allowed to this extent with no order as to costs." [4]

Dealing with the Constitutional question and provisions relevant to the subject and taking up the arguments of the Government on the question of religious freedom guaranteed by the Article 20 vis-à-vis the Islamic provisions, the minority view observed:

> "..... an argument was advanced that the other provisions of the Constitution should all be read, interpreted and applied as if they are additionally subordinate to and controlled by injunctions of Islam. Even the Fundamental Rights invoked in these appeals and the others not in issue should also be interpreted as if subordinate to Injunctions of Islam."[5]

Repelling this argument the minority view held that Article 2A was not supra Constitutional and did not have an overriding effect. The learned judge observed:

> "The effect of introduction of Article 2A of the Constitution and its becoming a substantive provision of the Constitution has been considered at great length by this Court in *Hakim Khan* and 3 others v.

Government of Pakistan through Secretary Interior and others (PLD 1992 SC 595). Its effect on the other Constitutional provisions and as a controlling and supervening provision has been considered as per Dr. Nasim Hasan Shah, J. (now the Chief Justice) in the following words:

"This rule of interpretation does not appear to have been given effect to in the judgment of the High Court on its view that Article 2A is a supra Constitutional provision. Because, if this be its true status then the above-quoted clause would require the framing of an entirely new Constitution. And even if Article 2A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing Constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objectives Resolution... Thus, instead of making the 1973-Constitution more purposeful, such an interpretation of article 2A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and. pave the way for its eventual destruction or at least its continuance in its present form... The role of the Objectives Resolution accordingly in my humble view, notwithstanding the insertion of Article 2A in the Constitution (whereby the said Objectives Resolution has been made a substantive part thereof) has not been fundamentally transformed from the role envisaged for it at the outset; namely that it should serve as beacon light for the Constitution-makers and guide them to formulate such provisions for the Constitution which reflect ideals and the objectives set forth therein... In practical terms, this implies in the changed context, that the impugned provision of the Constitution shall be corrected by suitably amending it through the amendment process laid down in the Constitution itself."

As per Shafi ur Rahman, J., it was considered as

hereunder:

"The provisions of Article 2A were never intended at any stage to be self-executory or to be adopted as a test of repugnancy or of contriety. It was beyond the power of the Court to have applied the test of repugnancy by invoking Article 2A of the Constitution for striking down any other provisions of the Constitution (Article 45)."[6]

Dealing with the argument raised on behalf of the Federation, that the fundamental right guaranteed by Article 20 was itself subject to law and that Ordinance XX of 1984 was a law for the purposes of Article 20 and therefore would hold good notwithstanding any apparent or substantial conflict with this provision, the minority view held that the supreme court decision in the case of Jibendra Kishore Achharyya (PLD 1957 SC 9 AT page 41) had adequately dealt with that argument. The minority judge quoted a lengthy extract from that judgment. A small portion of that excerpt is reproduced below for a ready and quick grasp of the issue at hand. The Supreme court had in the excerpt reproduced from the Jibendra Kishore's case held:

"The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law."
[7]

Dealing with Section 298B relating to restriction on Masjid and Azan, the minority view held:

"Historically this has been shown in the Lahore High

> Court case to be a tenet or a practice of Ahmadis or Qadianis not of recent origin or device and adopted not with a view to annoy or outrage the feelings and sentiments of non- Ahmadis and non-Qadianis. Being an essential element of their faith and not being offensive per se prohibition on the use of these by them and making it an offence punishable with imprisonment and fine violates the Fundamental Right of religious freedom of professing practicing and propagating and of Fundamental Right of equality inasmuch as only Qadianis or Ahmadis are prevented from doing so and not other religious minorities. It is not the "Azan" or the naming of the "Masjid" which has been made objectionable by law but doing of these by Ahmadis or Qadianis alone." [8]

About the prohibition on preaching by Ahmadis and inviting others to their faith the minority view held that the ban "would be violative of fundamental rights of religious freedom and of equality and of the speech in so far as they prohibit and penalize only the Ahmadis and Qadianis from preaching or propagating their faith by words either written or spoken or by visible representation. Invitation to one's faith when it is not accompanied by any other objectionable feature cannot be condemned..."

Dealing with the criminal cases involving conviction for wearing the badges of *Kalima Tayyeba* the minority view held that:

> "This conviction is defective because in view of the discussion and findings already recorded for an Ahmadi to wear a badge bearing *'Kalima Tayyeba'* inscribed on it does not per se amount to outraging the feelings of Muslims nor does it amount to his posing as Muslim." [9]

The minority further held:

> "The exhibition or use of *'Kalima Tayyeba'* correctly reproduced, properly and respectfully exhibited cannot be made a ground per se for action against those who use *'Kalima Tayyeba'* in such a manner. If for ascertaining its peculiar meaning and effect one has to reach the inner recesses of the mind of the man wearing or using it and to his belief for making it an offence then the exercise with regard to belief and the meaning of it for that person and the purpose of using and exhibiting the *'Kalima Tayyeba'* would be beyond the scope of the law and in any case it will infringe directly the religious freedom guaranteed and enjoyed by the citizens under the Constitution, where mere belief unattended by objectionable conduct cannot be objected to."[10]

THE MAJORITY VIEW

The majority judgment opened with the observation "I have had the benefit of going through the draft judgment proposed to be delivered by my learned brother Shafi ur Rahman, J. but with respect, I do not agree with the opinion of my learned brother." Though the learned author judge of the majority opinion had the benefit of reading the minority view, he did not advert to the case law cited in the minority opinion and did not specifically spell out the reasons of his dissent on the vital question involved. The majority view proceeded as if there was no minority view and as if there was nothing to be dissented from.

The majority opinion pointed out that "Mr. Fakharud Din G. Ibrahim the learned counsel did not

challenge the validity of sub section A of Section 298" which prohibited Ahmadis to use certain epithets descriptions and titles etc., The majority judgment, nevertheless, devoted a good part of the judgment to epithets descriptions and titles and observed that not only in Pakistan but throughout the world the laws protect the use of words and phrases which have special connotations or meanings which if used for others may amount to deceiving or misleading the people. The court held that law for protection of trade and merchandise marks exists in every legal system to protect the trade name or mark etc. with the result that no registered trade name or mark of one firm or company can be used by any other concern and violation thereof entitles the owners of the trade mark to receive damages and to bring criminal action. Relying heavily on the mercantile law the majority opinion held that Ahmadis cannot use the words and terminology and descriptions which are exclusively the right of Muslims. By adopting the Muslim terminology the Ahmadis practise deception. The court observed, "Again, if the appellants or their community have no designs to deceive, why do not they coin their own epithets etc." "It must, however, be mentioned here that there is no law in Pakistan which forbids Ahmadis to coin their own epithets etc. and use them exclusively and there is no other restriction of any sort, whatever, against their religion".

The court next held that since the appeals before the FSC had been dismissed and the appeal before the Shariat Appellate bench had been withdrawn and the Shariat appeal bench had observed that "judgment of the FSC shall rule the field" therefore the present appeals on the Constitutional jurisdictions were not

maintainable.

The court next held that in view of Article 2-A of the Constitution of the Islamic Republic of Pakistan whereby the Martial Law dictator had incorporated the preamble of the Constitution as a substantive part thereof, the fundamental rights guaranteed by Article 20 were subject to injunctions of Islam. The majority opinion thus made Article 2-A self executing and gave it an overriding effect

The Majority judgment next argued that though the religious practices of Ahmadis were clearly curtailed by the impugned Ordinance XX, they were within the permissible restrictions. In this behalf the majority opinion relied on some cases from the American jurisdiction.

On the question of vagueness the majority opinion conceded that if a law is vague it should be declared void but the court held that the appellants could not point out how the law was vague.

The majority in *Zaheer ud Din* held that Ahmadis will face no difficulty in coining new names epithets titles and description of their personages places and practices.

The majority opinion further held that when an Ahmadi or Ahmadis "display in public on a placard, a badge or a poster or write on walls or ceremonial gates or buntings, the *Kalima* or chant other shaa'ir-e-Islam it would amount to publicly defiling the name of the Holy prophet and other prophets and exalting the name of Mirza Saheb thus infuriating and instigating the Muslim. ----,

The reason for such finding was that "... there is a general consensus among Muslims that whenever an Ahmadi recites or displays *Kalima* he proclaims that Mirza Ghulam Ahmad is the prophet who should be obeyed and the one who does not do that is infidel. In the alternative they pose as Muslims and deceive others." (11)

The difference between the majority and minority opinion is sharp and fundamental. The court is divided on (a) the basic concept of permissible limitations on fundamental rights; (b) concept of discrimination and classification,' and (c) the overriding effect of Islamic provisions. The court is apparently divided on the very concept of Islamic provisions.

THE ERROR

"The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law."(1)

- Chief Justice Muneer

SUBJECT TO LAW

The controversy before the Supreme Court related to the fundamental right of religious freedom, guaranteed by the Constitution of Islamic Republic of Pakistan. In the Constitution of Pakistan, the right of religious freedom has been assigned a greater sanctity and has a higher dignity than the other fundamental rights because Article 20 of our Constitution cannot be suspended even under emergency declared under Article 232 of the Constitution. The right under Article 20 is, therefore, a right which cannot be derogated.

Ordinance XX was challenged before the Supreme Court of Pakistan, both, as an Ordinance on the face of it and in its application, which had to be examined on the internationally recognized judicial principles.

The judgment of the Supreme Court itself indicates that it was not seriously controverted that Ordinance XX did violate the fundamental rights of reli-

gious freedom guaranteed by Article 20 of the Constitution of Islamic Republic of Pakistan. The majority judgment validated the Ordinance as being within the permissible limitations and on the ground that the fundamental right of religious freedom was, according to Pakistan Constitution, "subject to law". In doing so the majority opinion has obviously overlooked the fact that the concept of permissible limitation of the human rights is referable to Article 29 of the Universal Declaration Of Human Rights, which provides that the exercise of this right and freedom shall be subject only to such limitations as are determined by law. The clause (2) of Article 29 of the Universal Declaration Of Human Rights reads:

> (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

It is now universally recognized and in a study carried out by the United Nations the special rapporteur also observed that in order to be legitimate such limitations must satisfy two essential criteria: it must be determined by law and it must be enforced solely for one or several of the purposes mentioned in the Article.(2) But the law itself should not be unduly restrictive of the rights of the freedom of thought, conscience and religion.' (3) 'Such limitations should not be of such a nature as to sacrifice minorities on the altar of majority, but to ensure greater measure of freedom for society as a whole.' (4) 'No doubt the balance between the limitations

and the overriding importance of the religious freedom has to be maintained. Genuine and legitimate aspirations and apprehensions of the majority group and its concerns about social cohesion must no doubt be given due consideration. It should be apparent, however, that in evaluating this particular aspect of the attitude of the State and of the predominant group towards a minority, the greatest caution must be observed; for, while the maintenance of social cohesion may be a legitimate aspiration, it has only too often been invoked by States and by predominant groups within States to justify tyranny and persecution'(5)

In keeping with these International standards the Supreme Court of Pakistan has consistently held that a fundamental right cannot be abridged or taken away by law, though the exercise of the right may be regulated under certain circumstances. The words "subject to law" in Article 20 has been interpreted by the Pakistan courts to permit regulatory measures and not to deny the fundamental right itself. *Jibendra Kishore Achharyya* is the leading case and lays down binding law on this point. In that case the fundamental right of religious freedom was in issue and Mr. Brohi had contended that the rights were "subject to law" and could therefore be taken away by law. The Supreme Court of Pakistan repelled that contention and observed:

> "The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law." (6)

This observation of Chief Justice Munir sounds very much like Justice Johnson in *Fletcher versus Peck* that the "state cannot revoke its own grants", and echo the observations of Justice Frankfertin in Harry Bridjes versus State of California that "Bill of Rights is not self-destructive."[7] In *Jibendra Kishore Achharyya* the Supreme Court of Pakistan further observed that:

> "every citizen has the right to profess, practice and propagate his religion and every sect of a religious denomination has the right to establish, maintain and manage its religious institutions, though the **law may** regulate the manner in which religion is to be professed, practiced and propagated and religious institutions are to be established, maintained and managed. The words 'right to establish, **subject to law**, religious institutions' **cannot and do not mean that such institutions may be abolished altogether by** the law". [8]

In *Abdul Ghani versus Islamic Republic of Pakistan*, M.R. Kiani, J. carried the concept a little further and referring to observations of the Supreme Court in *Jibendra Kishore Achharyya* observed:

> In that case it was observed by the supreme court that "very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by law, and it is not only technically inartistic but a fraud on the citizens for maker of a Constitution to say that a right is fundamental but it may be taken away by the law". But their Lordships further observed "the **law may regulate the** manner in which religion is to be professed, practiced and propogated and religious institutions are to be established, maintained and managed". By this **we do not understand their Lordships to mean** that there may be a law which would regulate the actual performance of pilgrimage, for actual performance is a ritual which itself constitutes the practice of religion. **What is intended to mean is that if in the performance of a religious duty certain secular steps have to be taken then these steps may be regulated by law.**" [9]

This interpretation of the phrase "subject to law" has been consistently **followed by the Pakistan Supreme Court in other cases as well. Dealing with a** question of *shia* religous procession in *Syed Sarfraz Hussain Bukhari versus the District magistrate Kasur* the Supreme Court of Pakistan followed the rule that the law did not envisage a total prohibition or outright refusal for all times to take out processions to participate in religious ceremonies or observances. The court held that authorities had only **power to regulate** the processions with regard to route, timing, halting places, the accomplishments and the conduct of the procession itself. The court held that such control and *regulatory conditions* must have the sole object of avoiding breach of peace. This power could not be used to **completely prohibit** the assembly or procession. [10]

These concepts applied by the Pakistan Supreme Court may be usefully compared with American concepts. When we study the American experience on the subject we find that in their search for a standard to ascertain and determine the permissible limits, the American Supreme Court has at different times applied "the secular regulation", "clear and present danger", "interest weighing" and "neutral purpose" standards.

The "secular regulation" test was applied by the

American supreme courts in cases touching on religious freedom. The rule meant that in the prosecution of its secular objectives the state may make laws and any objection to such a law on the ground that it violates some individuals religious belief should not be entertained. But in applying this principle the courts always insisted that the law must be secular in nature. The courts however insisted that the power to regulate must be "so exercised as not, in attaining a permissible end unduly infringe the protected freedom." (11)

However, the secular regulation rule was dropped after sometime and it became defunct because it left the door open for a great deal of disguised religious persecution and because a general regulation can be easily framed so as to deal with almost any unpopular group. Another rule known as the "clear and present danger" was evolved. Though the test of clear and present danger was evolved and insisted upon, *Potential or threatened* danger was never considered as a ground for limiting exercise of religious freedom. But even while applying the test of clear and present danger the courts in the U.S. did not refuse to examine the issue whether the clear and present danger did in fact exist. The legislative declaration was held to create merely a rebutable presumption.'(12) Then came the "interest weighing" approach. Lately the concept of "neutral purpose" has been evolved. About the American case law cited by the Supreme Court of Pakistan in *Zaheer ud Din* a more detailed analysis will be taken up in the next chapter.

Ordinance XX is neither covered by the concept of secular regulation nor by the concept of "clear and present danger" nor is it "a neutral law only incidentally

touching the religious belief." The law is clearly meant to restrict and punish the religious belief and practices of Ahmadis only. The very title of the law speaks of its religious character. The law is entitled anti-Islamic activities of Qadianis and Lahori Groups **Prohibition and Punishment** Ordinance.

Reverting to the Pakistani case law, the *Jibendra Kishore Achharyya*, which represented the basic law on the interpretation of "subject to law" was cited at the bar during the hearing of *Zaheer ud Din*. It was a unanimous judgment of five judges. The majority opinion in *Zaheer ud Din* did not even advert to this case in the evaluation of concept of "Subject to law". It could not have been overlooked. Shafi-ur-Rahman J. relied on this judgment and quoted extensively from *Jibendra Kishore Achharyya*. The majority opinion starts with the observation "I have had the benefit of going through the draft judgment proposed to be delivered by my learned brother Shafi ur Rahman J. but with respect I do not agree with the opinion of my learned brother." With this benefit of having gone through the minority opinion it is not easy to assume that *Jibendra Kishore Achharyya* was ignored only by an accidental omission. It would have been more in keeping with the practice of the Supreme Court either to dissent with the judgment after full consideration and overrule it as bad law or to refer the case to a larger bench. None of these two courses was adopted by the majority opinion. On this interpretation of "subject to law", therefore, the position of Pakistan Supreme Court is that as against the judgment of 5 judges in *Jibendra Kishore Achharyya*, the case of *Zaheer ud Din* represents another view of presumably 4 judges. It may be even less. The majority opinion on this

question is therefore not a binding law. It is neither in conformity with the internationally recognized juridical principles nor with Pakistani case law on the subject.

Article 2A

Another question on which the majority opinion has departed from the well established legal position in Pakistan is the interpretation of article 2A of the Constitution which was incorporated during the Martial law period. Abdul Qadeer J. observed:

> "The Article 2A, made effective and operative the sovereignty of Almighty Allah and it is because of that Article that the legal provisions and principles of law, as embodied in the Objectives Resolution, have become effective and operative. Therefore, every man-made law must now conform to the Injunctions of Islam as contained in Qur'an and Sunnah of the Holy Prophet (p.b.u.h). Therefore even the **Fundamental Rights as given in the Constitution must not violate the norms of Islam.**" (13)

To support this conclusion about the overriding effect of article 2A and Islamic provisions, Abdul Qadeer J. relied on the judgment of Nasim Hassan Shah and Shafi ur Rahman JJ. in *Pakistan Vs Public at large* (PLD 1987 SC 304; at 356) but significantly omitted to mention the subsequent view of these two judges much more elaborately expressed in *Hakim Khan.*

Even the jugment in *Pakistan Vs Public at large* holds exactly opposite of what Abdul Qadeer J. has argued to support the overriding effect of Article 2A. The quotation reproduced by Abdul Qadeer J. from the judgment of Nasim Hassan Shah reads:

> "Accordingly unless it can be shown definitely that the body of Muslims sitting in the legislature have enacted something which is forbidden by Almighty Allah in the Holy Qur'an or by the Sunnah of the Holy Prophet or of the principle emanating by necessary intendment therefrom "*no Court can declare such an enactment to be un-Islamic.*"(14)
>
> (emphasis added)

So it was necessary to show that religious freedom granted by the Constitution was forbidden by Qur'an and Sunnah.

Contrary to the above observation Abdul Qadeer J. has held that the Constitutional provision embodied in Article 20 can be struck down as being un-Islamic without showing how it was so. Justice Shafi ur Rahman in *Pakistan Vs Public at large* case dealt with the delegated authority held in trust by the chosen representatives of the people. This concept was elaborated with specific reference to article 2A and its overriding effect in the case of *Hakim Khan.* Abdul Qadeer J. failed to notice the opinion of Shafi ur Rahman and Nasim Hasan JJ. in the case of Hakim Khan where the opinion of both these judges was further elaborated. Omission to notice *Hakim Khan* and relying on the earlier case has lead to confusion. He also relied on PLD 1990 Supreme Court page 1172. This case does not pointedly advert to the question nor shed any light on the effect of making the Objectives Resolution as a substantive part of the Constitution. It only takes notice of the fact and applies it to a situation which may be defined as "unoccupied" field. In *Zaheer ud Din* it was not a case of unoccupied

field where recourse could be had to Islamic common law principles. It was a case of fundamental rights and Constitutional guarantee provided by Article 20 of the Constitution. Abdul Qadeer J. has given an overriding effect of Islamic common law principles, assuming that there were no provisions available in the Constitution, and overlooked the fact that it was not merely another provision of the Constitution but a provision relating to the fundamental rights. This view obviously needs very close re-examination.

Whether Article 2A is a supra-Constitutional provision and has an overriding effect over and above the other provisions of the Constitution has come under consideration of the Pakistan Supreme Court in a large number of cases. But let us first examine the history and content of Article 2A. Article 2A reads:

> "2A. Objectives resolution to form part of substantive provsions:-
>
> The principles and provisions set out in the Objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly."

The Objective Resolution, which hitherto formed the preamble of the Constitution and was made substantive part thereof by article 2A reads:

> Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust;
>
> And whereas it is the will of the people of Pakistan to

> establish an order-
>
> Wherein the State shall exercise its powers and authority through the chosen representatives of the people;
>
> Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;
>
> Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah;
>
> Wherein adequate provision shall be made for the minorities freely to profess and practice their religions and develop their cultures;
>
> Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;
>
> Wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;
>
> Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;
>
> Wherein the independence of the judiciary shall be fully secured;
>
> Wherein the integrity of the territories of the

Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity:

Now, therefore, we, the people of Pakistan, Conscious of our responsibility before Almighty Allah and men;

Cognizant of the sacrifices made by the people in the cause of Pakistan;

Faithful to the declaration made by the Founder of Pakistan, Quaid-i-Azam Mohammad Ali Jinnah, that Pakistan would be a democratic State based on Islamic principles of social justice;

Dedicated to the preservation of democracy achieved by the unremitting struggle of the people against oppression and tyranny;

Inspired by the resolve to protect our national and political unity and solidarity by creating an egalitarian society through a new order;

Do hereby, through our representatives in the National Assembly, adopt, enact and give to ourselves, this Constitution.

Prior to the incorporation of Article 2A the principles of Objectives Resolution were cited in aid of certain propositions urged before the Supreme Court in a large number of cases. The Objectives Resolution was sometimes described as the *grund norm* of Pakistani legal order, sometimes as an embodiment of our national

ethos and sometimes as the conscience of the Constitution. It was sometimes described as the corner stone of Pakistan's legal edifice as embodying the spirit and fundamental norms of the Constitutional concepts of Pakistan. The Supreme Court in those cases had always maintained that preamble is not enforceable and that it could be used only as a guiding principle and not as an enforceable provision of the Constitution. It was in this background that the Martial Law dictator intending to make it enforceable introduced Article 2-A making the Objectives Resolution as a part of the Constitution without adverting to the fact that the document is not set in the words of an enforceable legal or Constitutional provision. It was set in the form of ideals and principles. The introduction of Article 2-A gave rise to a truly animated debate in our law courts. The situation was, to start with, quite anomalous and confusing.

The Lahore High Court took divergent views. In the case of *Masoo versus United Bank Ltd.*, held that Article 2-A is not a self-executing provision of the Constitution and it can be rendered effective by appropriate legislature(15) whereas in *Sakina Bibi's* case, the Lahore High Court treated the Article 2-A as supra Constitutional and even struck down the provisions of the Constitution being repugnant to Article 2-A[16]

Similarly, different benches of the Sindh High Courtalso rendered conflicting judgments. One view was that 2-A was self-executing and was in control of the rest of the Constitution while others held the view that it was not so.

In a Karachi case *Habib Bank Limited versus*

Wahid Textile Mills Limited Justice Mamoon Qazi sitting as a single judge observed:

> "There being no further rule supplied by the Constitution rendering the Objectives Resolution enforceable by the Courts it cannot be considered as self-operative, notwithstanding the introduction of Article 2A in the Constitution.
>
> Although the fundamentals of our policy are clearly reflected in the Objectives Resolution and the principles of democracy and social justice as enunciated by Islam are to be clearly reflected in our laws, but no legislation in our country can be tested and struck down by the Courts on the touchstone of the Objectives Resolution or Article 2A of the Constitution or for that purpose, the Principles of Policy enshrined in our Constitution in Chapter 2, Part II thereof, as the Resolution is no more than a Declaration defining the ideology of Pakistan, not capable of being enforced by the Courts." [17]

The situation finally crystallized in the Supreme Court in *Hakim Khan's* case. In that case the Lahore High Court had taken a view that Article 2A is a supra Constitutional provision. The Chief Justice undertook an elaborate discussion of the objectives resolution as a preamble and then as a substantive part of the Constitution and its effect on the other Constitutional provisions as a controlling and supervening provision. On the basis of historical data and process of interpretation he came to the conclusion that the Lahore High Court did not give proper effect to the rules of interpretation and observed that:

> "This rule of interpretation does not appear to have been given effect to in the judgment of the High Court on its view that Article 2A is a supra-Constitutional provision. Because, if this be its true status then the above-quoted clause would require the framing of an entirely new Constitution. And even if Article 2A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing Constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objectives Resolution... Thus, instead of making the 1973-Constitution more purposeful, such an interpretation of Article 2A, namely that it is in control of all the other provisions of the Constitution, would result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form... The role of the Objectives Resolution, accordingly in my humble view, notwithstanding the insertion of Article 2A in the Constitution (whereby the said Objectives Resolution has been made a substantive part thereof) has not been fundamentally transformed form the role envisaged for it at the outset; namely that it should serve as beacon light for the Constitution-makers and guide them to formulate such provisions for the Constitution which reflect ideals and the objectives set forth therein. In practical terms, this implies in the changed context, that the impugned provision of the Constitution shall be corrected by suitably amending it through the amendment process laid down in the Constitution itself." [18]

Mr. Justice Shafi-ur Rahman in a concurring judgment in the same case interpreting Article 2-A and Objectives Resolution said:

> Objectives Resolution has three separate distinct components. The first is purely structural feature of it that the sovereignty of Almighty descending on the people of Pakistan constituting State of Pakistan is to be exercised through their chosen representa-

tives.

The second is its qualitative feature.

The third is its normative feature.

Nowhere in the Objective Resolution, either expressly or impliedly one finds either a test of repugnancy or of contrariety, nor empowering of an individual or of an institution or authority or even a Court to invoke, apply and declare Divine limits, and go on striking everything that comes in conflict with it by reference to Article 2A. Such an interpretation of Article 2A of the Constitution and appropriation of authority so to do amounts to usurpation. It would indeed be so when the amplitude of power reserved for the Parliament in the same Constitutional instrument is kept in view.

Apart from these broad features noted there are settled, classic, accepted principles of interpretation of Constitutional provisions. They 'should not be lost sight of, ignored or violated in euphoria for instant Islamization of Constitution, Government and society."[19]

The opinion in the *Hakim Khan* case was not a casual observation. It was the opinion of the Supreme Court percolated through different cases at various High Courts. By the time the Supreme Court of Pakistan decided *Hakim Khan's* case the views of the various High Courts on different aspects of the question had been thoroughly examined. The Karachi case of *Habib Bank Ltd. versus Waheed Textile Mills* had dealt with the juristic and forensic principles of interpretation of Constitution, Nasim Hasan Shah J. had adopted the historical method, which is a scientific method of reasoning. Shafi ur Rahman J. had clarified the conceptu-

al and philosophical aspects. All these cases had brought the issue under focus and shed a flood of light on the subject. *Hakim Khan* was thus the percolated wisdom of the superior courts of Pakistan.

This was the position of the Supreme Court, loud and clear, on the Constitutional status of Article 2A vis-a-vis the provisions relating to fundamental rights. The majority opinion in *Zaheer-ud-Din* ignored this judgment without even referring to it. This could not be a mere omission. The minority judgment had particularly referred to this case and quoted from *Hakim Khan* in extenso. The majority view "had the benefit of going through the draft judgment proposed to be delivered" by Shafi ur Rahman J. [20] This omission to note *Hakim Khan's* case which was the binding law on the day when *Zaheer ud Din* was decided renders the case of *Zaheer ud Din* a fit case for re-consideration.' (Case reported in the collection for review).

Shortly after decision of *Zaheer ud Din* Article 2A again came up for consideration of the full court in the case of *Mian Mohammad Nawaz Sharif.* In that case the full court held that:

"Fact that Objectives Resolution has been incorporated as a substantive part of the Constitution by virtue of Article 2A, does not justify reading into it any additional Fundamental Rights in Chapter pertaining to Fundamental Rights contained in the Constitution--Courts, however, while construing Fundamental Rights have to keep in view the Objectives Resolution and to place widest possible construction as advance the goals targeted/envisaged therein." [21]

Mr. Justice Abdul Qadeer who authored the majority opinion in *Zaheer ud Din* was a party to the judgment in *Mian Mohammad Nawaz Sharif* and did not dissent from the opinion. In yet another case in the same year Mr. Justice Abdul Qadeer Ch. was again a party to 5 judges bench in the case of *Kaniz Fatima versus Wali Mohammad* and others in which the court held:

> Article 2A cannot be pressed into service for striking down any provision of the Constitution on the grounds that it is not self-executing and also that another provision of the Constitution cannot be struck down being in conflict with any provision of the Constitution. Provisions of Article 2A, however, can be pressed into service when any enactment is in conflict with provisions of the Constitution. [22]

The court further held:

> Superior courts may not strike down such laws, rules, and regulations on the touchstone of Art.2A or 227(l) of the Constitution but the action under law can be tested in case where judicial review is permissible." [23]

and that:

> "Courts, however, are not vested with the jurisdiction to declare a law void on the touchstone of Art.2A as distinguished from Art.8 of the Constitution as such provision has not been made to enforce Art.2-A in the same manner as the fundamental rights can be enforced or the laws can be tested on the touchstone of fundamental rights. [24]

The full court in *Mian Nawaz Sharif* relied on *Hakim Khan*. Abdul Qadeer Choudhary J did not dissent. In the

case of *Kaniz Fatima* again *Hakim Khan's* case was relied upon. Abdul Qadeer J again did not dissent. The settled position thus boils down to this: Prior to the *Zaheer ud Din* case Article 2A had no overriding effect on the fundamental rights and was not self executing. After the *Zaheer-ud Din* case the same principle was reiterated, Abdul Qadeer J participating all along. Yet in the case of *Zaheer ud Din* an Ahmadi case, Abdul Qadeer J writing the majority judgment opened a window of exception. To an independent objective legal analyst this discriminatory exception meted out to Ahmadis tends to create a feeling that the course of justice has been sullied in *Zaheer ud Din's* case. The guarantees of Constitution would be rendered nugatory if the expediencies of the government of the time or the popular majority were to be made the basis of decision. A court which does not protect minorities may soon find itself able to protect none.

A close scrutiny of the judgment would indicate that the finding on the overriding effect of article 2-A does not really command the majority even in *Zaheer ud Din.* Shafi ur Rahman J specifically referred to *Hakim Khan's* case and positively held that Article 2-A would not override the fundamental rights. Saleem Akhtar J in para 3 of his note said "as regards applicability of Article 2-A, I reiterate the view expressed in *Hakim Khan's* case PLD 1992 S.C. 595."

Mr. Muhammad Afzal Lone J was a party to *Hakim Khan* concurred with leading judgment of the Chief Justice Mr. Nasim Hassan Shah and did not append any note of his own as was done by Shafi ur Rahman and Abdul Shakoor-us-Salam JJ. Thus he concurred not only in the judgment but also in the reason-

ing of Nasim Hassan Shah J. Mr. Justice Muhammad Afzal Lone sitting in *Zaheer ud Din* case signed the majority judgment and did not write a note to indicate his change of mind or to show that he no longer held the views expressed in *Hakim Khan*. The *Hakim Khan* case could not have escaped the notice of the majority judgment because the leading judgment by Shafi ur Rehman J specifically relied on *Hakim Khan*. Absence of any comment by Mr. Muhammad Afzal Lone J can either be attributed to an oversight or non application of mind by the learned judge on the overriding effect of Article 2A. If Muhammad Afzal Lone J be considered to be holding onto his views concurring in *Hakim Khan* then there is a majority in *Zaheer ud Din* for the proposition that Article 2-A has no overriding effect. If it be attributed to an omission then the opinion on Article 2-A is equally divided; Shafi ur Rahman and Saleem Akhtar JJ holding against the overriding effect and Abdul Qadeer and Wali Muhammad JJ holding for the overriding effect. In either case the majority of the Supreme Court found in *Zaheer ud Din* case is not in favour of overriding effect of article 2-A. On a larger analysis when we see the subsequent developments, preponderance of Supreme Court view is heavily tilted against the overriding effect of Article 2-A and for good reason, available in scholarly judgment of Shafi ur Rahman and Nasim Hassan Shah JJ, this anomaly in *Zaheer ud Din* needs to be resolved.

Though Abdul Qadeer J held that Article 2A will have overriding effect and the Islamic injunctions would prevail as the supreme law, it did not pursue the argument any further to show how the right guaranteed under Article 20 was un Islamic or against the letter and spirit of Objectives Resolution which according to Abdul

Qadeer J. had been given overriding effect by Article 2A. The Objectives Resolution inter alia provided that

> Wherein adequate provision shall be made for the minorities freely to profess and practice their religions and develop their cultures;

Is it, then, the case of the majority opinion that this part of Article 2A is also against Islam and must give way to the Islamic provisions? Whatever the concept of Islamic provisions may be. Does Article 2A then override not only the other provisions of the Constitution but overrides itself. Is Article 2A eating itself up. The reasoning of the majority opinion is self-destructive. There could be no better case for review.

The Pakistan Supreme Court judgment in *Zaheer ud Din* lays down the foundation of inquisitional proceedings. Whereas, the minority judgment argues that the practices not being *per se* offensive cannot be treated as offensive by reaching the inner recesses of the minds of accused Ahmadis to dig out offensive meaning into those practices, the majority opinion does exactly the same.

The majority opinion argues that because the practices of Ahmadis offend the mainstream Muslims, they can be prohibited. And further the majority opinion tries to read into the minds of the Ahmadi accused what is not expressed in words or overt acts.

Referring to section 298-C Professor Antonio Gultaree observes:

> The most sinister feature of Section 298(c) is that it amounts to a kind of Orwellian attempt at the thought control. Persons are to be charged and tried not on the basis of alleged anti-social acts, offensive even as the definition of these acts might be, such as calling one's place of worship a mosque. Rather, one is to be tried on the basis of one's inner state of mind or intentions, whether one deliberately intends to mislead or deceive other people with respect to his/her identity as a Muslim. Who can ascertain this short of a confession?"[25]

VAGUENESS

The majority opinion did not dispute the proposition that if a law goes beyond the frontiers that are fixed for a legislature or where a law infringes a fundamental right, or a law, particularly criminal, is vague, uncertain or broad, it must be struck down as a void law, to the extent of the objection. The court however was of the view that "appellants have not shown or demonstrated as to where is that vagueness. In order to succeed, the appellants ought to have shown that the constituents of the offence, as given in the law are so indefinite that line between innocent and condemned conduct cannot be drawn or there are attendant dangers of arbitrary and discriminatory enforcement or that it is so vague on the face of it that common man must necessarily guess at its meaning and differ as to its application."[26]

The court completely overlooked the fact that the appellants had submitted a long list of the day-to-day

practices involving normal behaviour of Ahmadis, which had been made subject to the impugned law.

Given below is an abstract of cases indicating the nature of allegations for an offence under section 298-C PPC which was produced before the Supreme Court at the hearing of Zaheer ud Din.

Total no. of cases under 298-C	1,790
Break-up:	
1. On offering daily prayers	84
2. On the use of kalema Tayyeba	691
3. On the allegation of calling Azan	36
4. On the allegation of preaching	251
5. On the allegation of posing as Muslim on various grounds	676
6. On the allegation of using epithets and verses	52

Break up of various acts brought under the Mischief of "Posing"

1. Writing *Bismillah* on Invitation card for a marriage;
2. Sending an Eid card with a Hadith of the Holy Prophet.
3. Writing *Bismillah* on the face of a shop;
4. Displaying a calendar bearing *Iftar* and *Sehr* timings and prayers for *Iftari* and *Sehri*;
5. Writing *Assalam-o-Alaikum* and *Inshallah* on an Invitation Card for inaugural ceremo ny of a shop;
6. Using the word "Iftar Party" on an invitation

card;
7. Writing of Qur'anic verse on a Neon sign;
8. Writing *Kalema* on a Tomb-stone;
9. Wearing a ring with an inscription of *"Alaisallah-o-be Kafin Abdaho"*
10. Writing a Qur'anic verse *"Nasrun Min Allah"* on a sign board;
11. Displaying a calendar having the Qur'anic verse saying "It is better for you if you fast".
12. Greeting with *Assalam-o-Alaikum*
13. Displaying bunting on the occasions of *Miladun Nabi.*
14. Reciting *Takbirat* in the Eid Prayers;
15. Reciting Holy Qur'an in a loud voice;
16. Centenary celebrations;
17. Using the word *Marhooma* in an obituary notice;
18. Offering *Janaza* prayers;
19. Having *Bismillah* printed on a cash memo;
20. Reciting *Darood* on loud speaker;
21. The use of world *Aitekaf* in an application for leave during the month of Ramazan in order to sit in *Aitekaf.*

In view of this recorded submission of the appellants it could not be said that the appellants had not shown the vagueness of section 298-C in its application. The Ordinance XX had been challenged on its face and in its application. On the face of it the ordinance clearly and unmistakably denied all the three rights guaranteed under Article 20 of the Constitution i.e. right to profess, right to practice, and right to propagate. The right to profess and practice were prohibited by the clear text and letter of the ordinance which made the calling of the

faith as Islam and preaching and propagating punishable. The practice of faith was denied by an extended application of the word "*pose*". The manner of application was clearly demonstrated by reference to the cases registered. Not only were the ordinary day to day innocent spontaneous social behavior and etiquette brought under the mischief of law but also admitted religious practices of prayers, sacrifices, fasting and funerals were brought under the ambit of 298-C by applying the word "*pose*". There **can be no worse application of a law so** vague. It was clearly a case of the law being "overbroad" and indefinite so as to leave the appellant constantly guessing as to what conduct will constitute an offence. The application was clearly arbitrary and discriminatory in its enforcement. There was no line between the condemned and innocent acts. Yet the law was validated. This is a clear departure from the recognized cannons of interpreting criminal statutes.

Azan

Mr. Abdul Qadeer J at page 1775 observed:

> It is not correct to say that Azan is not mentioned in the ordinance. In fact sub section 2 of 298 C is exclusively devoted to it."[27]

It was nobody's case that Azan is not mentioned in the ordinance. That argument was raised in respect of *Kalima Tayyeba.* Of course Azan has clearly been included in the text of the ordinance and has been proscribed for Ahmadis. It was admittedly a religious practice of Ahmadis as held in *Abdur Rahman Mobashar.* So the challenge against the prohibition of Azan was not on

account of its omission in the text. It was on a more solid ground of a clear violation of an established religious practice.

Kalima Tayyeba

The attitude of Ahmadis towards *Kalima Tayyeba* which is a fundamental of their faith may be aptly put; "if I had ten thousand millions of lives I would spend them all for my faith in *Kalima Tayyeba*"

Conscious of the fact that *Kalima Tayyeba* was not mentioned in the ordinance, Abdul Qadeer J. goes on to justify why Ahmadis should be denied *Kalima Tayyeba* and ends up with the observation:

> "in the light of what has been said above, there is general consensus among the Muslims that whenever an Ahmadi recites or displays Kalima he proclaims that Mirza Ghulam Ahmad is the prophet and should be obeyed and one who does not do that he is an infidel."[28]

General consensus can by no means be a substitute for a statute. The rule that a criminal statute cannot be extended beyond the letter of law and cannot be extended by implication was clearly violated here. The *Kalima Tayyeba* has been made punishable NOT by the letter of the ordinance but by the tyranny of the extended application emanating directly from the vagueness of the law. Abdul Qadeer J. has gone a step further and made *Kalima Tayyeba* punishable not even by extended application of law but on account of what the learned judge describes as *general consensus among the Muslims*. General consensus, even if it existed cannot

take place of law unless translated into statute, which in the present case has not been done. The judgment holds that though the statutes did not proscribe *Kalima Tayyeba* yet it can be made punishable by implication because the mainstream Muslims by consensus hold it to be offensive. If there was a consensus it was known to the law maker when the law was made and yet it was not included in the law. How could it be made punishable passes all imagination. Here we clearly have a transgression which calls for a corrective measure.

On the Constitutional issue the majority judgment completely overlooks the issue of discrimination. The ordinance in its preamble clearly defines its purpose to "prohibit and punish" activities of Qadianis, which have been described as anti-Islamic. Thus the ordinance singles out a religious group for penal action on the ground of religion alone. It is manifestly a case of stark discrimination.

THE ERROR MULTIPLIED

(MISAPPLYING THE AMERICAN CASE LAW)

The Majority in *Zaheer-ud-Din* relied heavily on the American Supreme Court and cited some dubiously relevant cases from American jurisdiction. The American cases referred to in *Zaheer-ud-Din* were not cited by either party and constituted nobody's brief. The court canvassed these propositions suo moto, with the observation that:

> "We have referred to the above view from such countries, which claim to be the secular and liberal and not religious or fundamentalists."[1]

And approving the judgment of the Lahore High Court observed:

> "we highly appreciate that the learned judge relied, in this respect, on precedents from the jurisdiction, which are either secular or claim to be the champions of human rights."[2]

The history of religious persecution and religious freedom in America and Pakistan have many parallels and Pakistani Courts may justifiably draw on the American experience. The American law is that religious practice may be regulated on the grounds of secular regulations and clear and present danger. The expression adopted in some judgments is 'neutral purpose'. Law restricting or regulating some religious practice may be validated if the purpose of the law is neutral and secular and touches upon the religious practice only incidentally. No law can be validated if the purpose of law is to curtail religious freedom.

If the Learned Judge found it necessary to satisfy the world conscience and refer to foreign jurisdiction on the subject, then it was pre-eminently essential to consider the case law in depth. Any such effort however is sadly lacking. Out of the 6 cases cited from the American jurisdiction 2 cases are more than 100 years old while other 2 are as old as 50 years. No effort was made to discover how concepts have been refined, elucidated and enriched during the last 100 years. The latest cases on the subject of religious freedom from American jurisdiction were not examined at all. The secretarial assistance received by the Pakistan Supreme Court on the American case law appears to be very poor indeed. The cases have been cited out of context and have been misapplied.

Reynolds vs U.S.

The majority opinion in Zaheer-ud-Din referring to Reynolds observed:

> "The Supreme Court of America in the case of *Reynolds, v. United States.*(98 US 145-168 (1878)) held that "Congress was deprived of all legislatable power over mere opinion, but was left free *to reach actions which were in violation of social duties* or subversive of good order.... Laws are made for the Government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices".[3] *(emphasis added)*

Reynolds was a case more than one hundred year old. The court was dealing with polygamy, which, in the American context, was considered to be a practice, in violation of social duties, and subversion of good order.

In "*Reynolds*" the court quoted from Madison to say that, " religion or the duty we owe the creator" was not within the cognizance of civil government[4]." The court also quoted Mr. Jefferson on religious freedom saying, " that to suffer the civil Magistrate to intrude his powers into the field of *Opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty*[5]. Jefferson was further quoted to have declared,

> "that it is time enough for the rightful purposes of the civil Govt. for it's officers to interfere when *principles breakout in overt acts against peace and good order*" [6] *(emphasis added).*

The court, in Reynolds, concluded that,

> "In these two sentences is found the true distinction between what properly belongs to the church and what to the state." [7]

The court validated the law against polygamy on the reasoning that marriage, while from it's very nature is a sacred obligation, nevertheless, in most of the civilized nations, is a civil contract and is regulated by civil law.[8]

The Court observed that:

> "We think it may safely be said, there never has been a time in any state that polygamy has not been an offence against the society, cognizable by the civil courts and punishable with more or less severity." [9]

So the law against polygamy was being validated because it was in accordance with a social duty and because marriage was a civil contract and because polygamy has always been considered an offence in American society. The court validated the law also because otherwise it will be discriminatory, applying two sets of laws to two sets of people, "This will be introducing new element into criminal law." the court said.[10]

In any case no law declared Mormons as "not-Christians". They were not debarred from professing their faith in Christianity, even though many people considered Mormons not to be Christians, nor were the Mormons prohibited from adopting Christian practices. The law under challenge in *Zaheer-ud-Din* clearly provided discrimination between two sets of people and it penalized not a social obligation but professing religious belief and devotional acts which according to *Reynolds* is beyond the reach of legislature. The practices made punishable by Ordinance XX had been practiced by Ahmadis for more than hundred years and had never been considered an offence or even undesirable in the past. Ordinance XX clearly does not refer to any social duty. The practices prohibited by Ordinance XX are not in violation of any social duty. The profession of faith and the propagation by Ahmadis were prohibited on their *supposed ill tendency. "Reynolds"* obviously did not apply.

Cantwell Vs Connecticut.
(310 US296-311)

Another case cited by the majority opinion from the American Jurisdiction is Cantwell vs. Connecticut[11]. The majority in Zaheer-ud-Din observed:

> "The fundamental right, relevant here, is the 'freedom to profess religion' but it has been made 'subject to law, public order and morality'. The Courts of other countries, which have similar fundamental rights, have held that this right embraces two concepts; freedom to believe and freedom to act. Some of them held the former to be absolute but others said that, that too was subject to law etc. However, all are agreed that the latter in the nature of things, cannot be absolute. According to them, conduct remains *subject to regulation* for the protection of the society. So the freedom to act must have appropriate definition to preserve the enforcement of that protection. The phrase 'subject to law', on the other hand, does neither invest the legislature with unlimited power to unduly restrict or take away the Fundamental Rights guaranteed in the Constitution, nor can they be completely ignored or by-passed as non-existent. A balance has thus to be struck between the two, by resorting to a reasonable interpretation, keeping in view the peculiar circumstances of each case."[12] *(Emphasis added)*

Abdul Qadeer J made no reference to the facts of the case and though he cited *Cantwell*, he chose not to quote from the decision of *Cantwell*. He deduced the following principles namely, (1) freedom of belief is absolute (2) freedom to act cannot be absolute (3) a balance must be struck. There is no cavil with the principles stated. The vital question however is, whether these principles could be applied to *Zaheer-ud-Din*.

Cantwell was a case relating to a statutory prohibition against soliciting money without obtaining a certificate of approval. *Cantwells* were charged for violation of the statute and for breach of peace and were convicted on five counts. The judgment affirming the convictions was reversed by the US Supreme Court and the case was remanded "for further proceedings not inconsistent with this opinion"*(meaning the opinion of US Supreme Court, in *Cantwell*). It is worthwhile to examine the opinion in some detail. The *Cantwell* opinion observed:

> "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand it safeguards the free exercise of the chosen form of religion."[13]

and that:

> "Conduct remains subject to *regulation* for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the *power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.* ....."[14] *(Emphasis added)*

Thereafter the Court observed:

> " it is equally clear that a state may by *general* and *non-discriminatory* legislation *regulate the time, the places and the manner* ....."[15] *(Emphasis added)*

In *Cantwell* the court also observed:

> "Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and infinite characterization, and leaving to the executive and judicial breaches too wide a discretion in its application." (16)

The US Supreme Court further observed:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor."(17)

and further that:

> "The essential characteristic of these liberties is, that under their shield many types of like, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds....." (18)

The burden of judgment in *Cantwell* is, protection of freedom and regulation of the acts with regard to time, place and manner. The law under challenge in *Zaheer-ud-Din* was a case of complete denial of the right and not of mere regulation. Ordinance XX punished profession of religious belief and was not merely regulatory in nature in respect of the religious practices; it completely took away that right and infringed the protected freedom by a statute sweeping in great variety of conduct

under a general and indefinite characterization under a vague term "*Pose*". The majority opinion in *Zaheer-ud-Din* sanctioned penalizing allegedly hidden and purported belief wrongly attributed to the Ahmadis. The majority tried to read into the minds of the accused persons sinister meaning into otherwise innocent and laudable words of *Kalima Tayyeba*. How could *Cantwell* be applied in the case, passes imagination. Abdul Qadeer J clearly misapplied Cantwell.

Jones versus Opelika.

Another case cited by Abdul Qadeer J is *Jones versus Opelika*. The *Jones versus Opelika* was one of the series of cases, which led to the crystallization of the law on the subject. The case related to license fee upon the sale of literature. The license fee included religious literature as well. The question in *Jones* was whether a non-discriminatory license fee could be imposed. The statute was validated because it was neutral and non-discriminatory. Like *Zaheer-ud-Din* it was a case of divided opinion. Mr. Justice Reed delivered the opinion of the court. Dealing with the subject he observed:

> "We have before us the question of the Constitutionality of various City Ordinances imposing the license taxes upon the sale of printed matter"(19).

The Jones court observed:

> "We turn to the Constitutional problem squarely presented by these ordinances. There are ethical principles of greater value to mankind than the guarantees of the Constitution to the personal liberty,

> which are beyond the power of government to impair. These principles and liberties belong to the mental and spiritual realm where decision and decrees of mundane courts are ineffective to direct the course of man. The rights of which our Constitution speaks have a more earthly quality. They are not absolute to be exercised independently to other cherished privileges protected by the same organic instrument"[20]

and that:

> "Court no more than a Constitution can intrude into the consciences of men and compel them to believe contrary to their faith or think contrary to their convictions, but courts are competent to adjudge the acts men do under colour of Constitutional rights, such as that of freedom of speech or of the press or free exercise of religion and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind. *So the mind and the spirit of man remain free* while the actions rest subject to *necessary accommodation* of the competing needs of his fellows"[21].

Thereafter the whole argument of Jones case relates to regulations of the conduct. The court made it clear that:

> "There is to be noted too, a distinction between non-discriminatory regulations of operations which are incidental to the exercise of religion from the freedom of speech or the press and those which are imposed upon the religious right itself of unmixed dissemination of information".[22]

> "If we were to assume, as is here argued, that the licensed activities involve religious rites, a different question would be presented. These are not taxes on free will offerings. But it is because we view these

> sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid.[23]

Jones principle cannot be made applicable in *Zaheer-ud-Din*, wherein Constitutional validity of Ordinance XX had been challenged which was clearly discriminatory and directly hit the exercise of religion. It was a case of complete denial as distinguished from regulation of religious practices. The most significant aspect of *Jones* however is that it paved the way for reversal of an earlier decision of *Gobitis*, in a subsequent case of *Barnette.*

Mr. Justice Murphy, with whom the Chief Justice, Mr. Justice Black, and Mr. Justice Douglas concurred, dissenting, observed:

> "Ordinances that may operate to restrict the circulation or dissemination of ideas on religious or other subjects should be framed with fastidious care and precise language to avoid undue encroachment on these fundamental liberties. And the protection of the Constitution must be extended to all, *not only to those whose views accord with prevailing thought but also to dissident minorities* who energetically spread their beliefs".[24]

> "Liberty of conscience is too full of meaning for the individuals in this nation to permit taxation to prohibit or substantially impair the spread of religious, ideas, even though they are controversial and run counter to the established notions of a community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights."[25]

The judges then went on to say:

> "Since we joined in the opinion in the Gobitis Case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be."[26]

To put the things in proper perspective it needs to be mentioned here that in 1940 the court in *Gobitis*, had held that:

> "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious belief."[27]

Gobitis was the subject of unprecedented scholarly and editorial criticism when it was issued and was expressly overruled in three short years in *West Virginia State Board of Educ. v. Barnette*, one of the most celebrated Constitutional decisions in American history.

In *Barnette*, Justice Jackson eloquently wrote:

> "The very purpose of a Bill of Rights was to withdraw certain subject from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[28]

Jones paved the way and *Barnette* overturned the *Gobitis* in a matter of three years, because the civil Liberties Union and the enlightened public opinion in the US strongly reacted to *Gobitis*. In Pakistan enlightened public opinion and Human Rights Commission have also condemned Ordinance XX. One can only hope that experience of *Jones versus Opelika & Barnette Versus Board of Education*, will be repeated in Pakistan and some future judges will follow the spirit of Jones and think it proper to state that *Zaheer ud Din* was wrongly decided.

The Willis Cox
Vs
State of New Hampshire

Abdul Qadeer J also relied on *The Willis Cox Vs State of New Hampshire*. The Willis Cox Case also related to regulation with regard to time, place and manner. The sole charge against the appellants was that they were taking part in a parade or procession on a public street without a permit required by the statute. The Court held that statute, requiring persons using the public street for a parade or procession to procure a special license from the local authorities did not constitute an unconstitutional interference with religion. Mr. Justice Hughes delivered the opinion of the court and statute requiring such permit or license was validated and observed that:

> "The sole charge against the appellants was that they were "taking part in a parade or procession" on the public streets without a permit as the statute required. *They were not prosecuted for* distributing leaflets or for conveying information by placards or

> otherwise, or for issuing invitations to a public meeting or for *holding a public meeting or for maintaining or expressing religious beliefs*. Their right to do any one of these things apart from engaging in a "parade or procession" upon a public street is not here involved and the question of the validity of a statute addressed to any other sort of conduct than that complained of is not before us"[29]
>
> *(emphasis added)*

> "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties, but rather as one of the means of safe-guarding the good order upon which they ultimately depend."[30]

And further that:

> As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted *so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought* and the discussion of public questions immemorially associated with resort to public places.[31]

The court finally observed:

> "*No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions.*"[32]
>
> (emphasis added)

This case also could not serve the purpose of supporting an argument validating Ordinance XX which was under

challenge in *Zaheer-ud-Din's* case.

The Hamilton & Plaisted

The majority opinion in *Zaheer ud Din* also relied on *Hamilton Vs Board of Regents of University of California* (1934) 293US 245 and *Commonwealth vs. Plaisted.*(1889) 148Mass 375. The cases were quoted from Shareef-ud-Din Pirzada's book on fundamental rights. *Hamilton* was a case of students who refused to get compulsory military training imposed by the University of California. Military training being an obligation to defend the state has nothing in common with the practices penalized by Ordinance XX, which were purely religious. Refusal by students of a university to join compulsory military training on the ground of religious belief has no parallel with the case of Ahmadis, who did not refuse to perform any social duty or to defend the country against all enemies.

"Plaisted" was a hundred years old case relating to use of streets for religious meetings or beating drums. The fundamental right of religious worship was not at issue. How the obvious difference between regulating and denying a right escaped the notice or attention of the Pakistan Supreme Court, is not easy to understand.

It has been demonstrated above that the American cases cited by Abdul Qadeer J, did not support the reasoning adopted in *Zaheer ud Din.*

All the laws challenged in these US cases were neutral, universal and non-discriminatory but the Ordinance impugned in *Zaheer ud Din* is manifestly discriminatory

and singles out Ahmadis for a penal law, which punishes the religious practices of Ahmadis. As indicated in the opening observations of this chapter, the American case law was cited with the object of silencing the criticism of the liberal and enlightened public opinion and the Human Right concerns. In return the court has attracted uncomplimentary remarks from legal circles.

PROFANING THE PROFOUND

Religion Relegated To Merchandise

The majority judgment in *Zaheer-ud-Din* invoked the trademark law to argue that Islamic principles and practices can be denied to Ahmadis on the analogy of trademark law. *Abdul Qadeer J* cited Indian and Pakistani trademark Laws and penal code and observed:

> "The law for protection of trade and merchandize marks exists, particularly, in every legal system of the world to protect the trade names and marks etc. with the result that no registered trade names or mark of one firm or company can be used by any other concern and a violation thereof, not only entitles the owners of the trade name or mark to receive damages from the violator but it is a criminal offence also."[1]

and concluded that:

> "It is thus clear that intentionally using trade name, trademarks, property marks or descriptions of others in order to make believe others that they belong to the user thereof amounts to an offence and not only the perpetrator can be imprisoned and fined but damages can be recovered and injunction to restrain him issued. This is true of goods of even very small value. For example the Coca Cola Company will not permit anyone to sell, even a few ounces of his own product in his own bottle or other receptacles marked coca cola, even though it's price may be a few cents. Further, it is a criminal offence carrying sentences of imprisonment and also fine. The principles involved are; do not deceive and do not violate the property rights of others"[2]

One would hate to believe that Abdul Qadeer J considered faith a salable commodity. Trademark law does not apply to deeply held religious epithets & practices. Faith and religion, worship and devotional acts are sublime and spiritual and are so personal between God and man, that no mundane, physical or commercial give and take or sale and purchase is conceivable. Who can claim monopoly or trademark on eternal verities and universal concepts, ideas, gifts and bounties of mother nature, or word of God meant for the whole humanity. It is an absurdity to apply trademark law to religion.

Coming to the material aspect, it needs to be appreciated that the trademark law protects the commercial interest of the manufacturer or designer. Only the originator, manufacturer or designer can claim the exclusive right against another manufacturer or designer. Abdul Qadeer J surely does not believe that the mainstream Muslims of any denomination whatsoever are the designers, originators or manufacturers of Islam. The origin of Islam is divine and universal and the prophet of Islam is mercy for entire universe. According to the Muslim belief, even the Holy Prophet (SAS) is not the originator, inventor or the author of Qur'an, which is literally the word of God revealed to the Holy Prophet Muhammad(SAS). No one can claim trademark of any religion, which is of divine origin and has been vouchsafed and bestowed upon mankind by God.

Then again, the trademark relates to the visible marks, words or names and not to the natural constituents and contents. Coca Cola cannot claim that no other company producing beverages can use water,

sugar, caffeine, preservatives, additives or other ingredients. Juices and Jams of another manufacturer cannot be sold under the name of Michels Juices or Michels Jams. But that does not preclude any other manufacturer from the use of fruits, vegetables and other ingredients used by Michels. The contents and the ingredients are nature's bounty and a universal heritage. No one can claim a copyright or trademark over them. A perfumer may bottle and sell, rose, lavender or sandal under a trade name but cannot monopolize the fragrance of rose lavender or sandal.

Even if the trademark law could by any stretch be applied to religion, it would at best apply to the name of Islam. The name having been denied to Ahmadis, the content, the teachings and the practices, which Ahmadis believe to have been ordained by God cannot be denied to them by any self-styled ecclesiastical or political hierarchy on the analogy of trademark.

There are many schisms in Islam giving rise to different sects. These sects may be viewed as different versions of Islam with varying degree of emphasis on any particular aspect or principle of Islam. On the analogy of Abdul Qadeer J. Shia, Sunni, Daobandi, Barelvi, Ahle-Hadith, Ahle- Qur'an etc are all different brands of Islam. There are also Saudi, Egyptian and Iranian versions and interpretations of Islam. Following the analogy of Abdul Qadeer J. in the light of the observations made above, it would appear that Islam is the universal heritage and bounty of God and these different sects have adopted their different *Brand Names* for the different formulae of the same ingredients derived from the same source i.e. Qra'an and Sunnah. If there can be 72

Brand Names why not 73? Who can claim a monopoly on the teachings of Qur'an? Can Saudi's claim exclusive right against Egyptians or Iranians or can Deobandis do so and exclude Barelvis and so on?

But it seems that such fanatic claims are not the monopoly of Pakistani clergy alone. Such fundamentalist fanatics may be found elsewhere also. But such claims have never been accepted. American experience can be cited here with some benefit.

A group of eminent lawyers and university professors of Minnesota USA, referring to this aspect of *Zaheer-ud-Din* cited as many as five cases from the American Jurisdiction where such claims of monopoly over some religion or religious practice were brought to the court. In each case, the court rejected the claim. The Minnesota lawyers cited the following cases :

1. They cited McDaniel Vs Mirza Ahmad Sohrab; (27 NY 2D 525,527(1941))
2. General conference Church Corp. of seventh day Adventists Vs Seventh day Adventists Congregational Church. 887 F. 2d 228 (CIR 1989)
3. Christians Science board of directors of first church of Christ Vs Evans. 520 A 2d 1347 (1987)
4. Board of provincial elders of southern Province of Moravian Church Vs Jones. 37 SE 2d 545 (1968)
5. New thought church Vs Chaplin 144 N.Y.S. 1026(1913)

and observed that:

> "Drawing an analogy between the Coca-Cola Company's trademark use and Ahmadis representing themselves as Muslims, the Court accused Ahmadis of infringing upon the use of Islamic terminology and practices, because they are non-Muslims according to Article 260(3) (a) of the Pakistan Constitution. Id at 1753-54. This unfortunate analogy is insupportable under United States law. [3]

and citing the cases referred above concluded that:

> "The *McDaniel* decision, and the other decisions cited above, properly elevate religious expression above commercial endeavors. Religion cannot be treated as merchandise, nor can religious practices be copyrighted. Religion is universal in nature and thus cannot be owned by anyone in particular. Comparing prayers to trademarks and religions to corporations equates the mundane world of commerce with the sublime and spiritual realm of religion. An analogy between trademark law on one hand, and religion on the other, denigrates the religious beliefs of all."[4]

In short, to treat religion as a commodity is to desecrate and profane the name of religion. The analogy is most unfortunate.

THE ANIMUS APPARENT

"...and let not a peoples' enmity toward you incite you to act otherwise than with justice. Be always just, that is closest to righteousness"

Al Qur'an [1]

"to suffer the civil magistrate to intrude his powers into the field of opinion and restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at-once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own."

(Thomas Jefferson) [2]

The question before the court in *Zaheer -ud-Din* was a purely Constitutional one and appellants scrupulously confined their arguments to the Constitutional question. The religious controversies or doctrinal issues were neither raised by the appellants nor argued, nor were they germane to the points in issues. It is axiomatic that a judge must wear all the laws of the country on the sleeves of his robe. Even so the judges are not infallible in deciding even the pure questions of law. Notwithstanding the presumption about their profound knowledge of law, judges are not necessarily presumed to be well versed in all the sciences, fine arts, metaphysics, mysticism or scriptures or exigecies. The entire argument based on religious controversy is misplaced. The present author does not wish to include any detailed comments on the religious issues or theological debate

and has left that to be treated in a different treatise to which the reader must return for a fuller account of religious argument.

As one reads the majority opinion in *Zaheer ud Din* one is struck by the language of the judgment. The apex court of Pakistan has held that, "If a judge includes improper language, or becomes excitable then the impersonal concept of the seat of justice gets a rude shock." and that, "A judge who adorns the seat of justice should always be careful to maintain the dignity of his office. If a judge becomes excitable and insultive to a party or a counsel then the confidence of the public is liable to be shaken in the administration of justice."[3] It is not the province or duty of the court to pronounce on the truth of religious belief. Expression of opinions in matters of religious faith has also been disapproved by the Supreme Court of Pakistan because, "In such matters there can always be room for some difference of opinion and a Judge should not assume the role of an adviser or theologian."[4] That is precisely what Abdul Qadeer J has done in *Zaheer-ud-Din*. Ahmadis have been advised by the court to coin their own epithets. He has in fact suggested change of theology for Ahmadis by validating a law, which clearly infringes religious freedom.

The majority opinion in *Zaheer ud Din* appears continuously locked up in a religious and theological debate with Ahmadis and appears to be arguing the case of fundamentalist mainstream Muslims against the Ahmadiyya belief. The effort is scarcely veiled. The language used is not only *improper and excitable* but manifestly abusive and provocative. It has been described in the international circles as "a diatribe against the

Ahmadiyya belief and as having no place in judicial rulings."[5] From some of the observations, which dropped from his pen, the learned judge seems to have reserved his choicest venom against Ahmadis. He describes their faith as *hollow*, relying on *deception* and refers to the founder of the movement in a language of ridicule and goes to the extent of inciting and sanctioning violence against Ahmadis.On account of this language the impersonal character of the seat of justice has indeed received a rude shock.

A senior Pakistani lawyer Barrister, A.G.Chaudhry, writing an analytical comment on *Zaheer-ud-Din* observed:

> "Throughout the majority opinion, we find the belief of the author judge that the Muslims feel animosity against Ahmadis because they feel that the Ahmadiyya Movement is a "serious and organized attack" on their "ideological frontiers" and "a permanent threat to the integrity and solidarity" of majority community. The "mere fact that Ahmadis believe in Holy Qur'an, Sunnah, and same fiqh (subject of course to certain alterations") cannot possibly be a ground of "annoyance to any reasonable man". [6]
>
> "The majority judgment has been principally motivated by the assumption that the orthodox Muslims entertain hatred against Ahmadis on account of the concepts of shadowism, re-incarnation and transmigration in which they believe. It has been said that these concepts are violative of the basic tenets of Islam. The present writer, who is a Sunni Muslim, does not subscribe to any of these beliefs, which may or may not be an essential part of Ahmadiyya religion but he continues to adhere to his view expressed by him in *Balancing the Constitution* that "the right of a man to entertain such *organize* religious views as appeal to his individual conscience without dictation or interference by a person or power, civil or ecclesiastical, is as fundamental as is the right to life and liberty. The religion may be theistic or a monotheistic religion, its adherents may believe in one or any Prophet or many Prophets, it doubtless enjoys the Constitutional guarantee".[7]

One is reminded of the observation of the American Supreme Court in *Lukumi Babalu Aye Vs Hialeh*

> "..... ***upon even slight suspicion that proposals for State intervention stem from animosity to a religion or distrust of its practices***, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."[8]

It would have been just, fit and proper for the court to take heed to the word of God,

> *"...and let not a peoples' enmity toward you incite you to act otherwise than with justice. Be always just, that is closest to righteousness"* [9]

In *Zaheer-ud-Din* the religious argument is in excess of jurisdiction and irrelevant to the Constitutional questions raised.

The Socio Political Argument

The majority opinion appears ready, willing and keen to catch at every and any argument to validate the ordinance. In that effort court has traveled far beyond its jurisdiction. The court canvassed a socio-political argument and proceeded to record a finding that:

> "Ahmadis always wanted to be a separate entity and claimed a status distinct and separate from others,"[10]

and observed:

> "The Ahmadis are therefore non-Muslims; legally and Constitutionally and, are on their own choice, a minority opposed to Muslims."[11]

The court further observed:

> "As said above, the Ahmadis, also always wanted to be a separate entity, of their own choice, religiously and socially." [12]

The finding that the Ahmadis have always wanted to be a separate entity and hence are non-Muslim minority of their own choice does not stand scrutiny. The observation is contradicted by the judgment itself which says:

> "The Ahmadis have been declared non-Muslim by Article 260(3)(B) of the Constitution."[13]

Clearly it does not indicate a choice of Ahmadis, it is obviously the coercive force and Constitutional fiat that declared them Not Muslims. Again, the court said:

> "they were therefore asked to restrain themselves from directly or indirectly posing as Muslims or claiming legal rights of Muslims."[14]

So, they were asked; it was not their choice. They were constrained; they did not opt.

Then again:

> "Undoubtedly, they are an insignificant minority and have because of their belief been considered heretics and so Non-Muslim by the main body of Muslims. Apart from what has been said above the right to oust dissidents has been recognized, in favour of a main body of a religion or a denomination by the court,....."[15]

The reference to *"insignificant minority"* and the "*right to oust*" negate the assertion that it is a case of free choice. The argument is fallacious and self destructive. It is an admitted fact that Ahmadis were declared and classified non-Muslims against their wishes by a Constitutional amendment. When Ordinance XX was challenged before the Federal Shari'at Court, the Court justified Ordinance XX on the ground that despite the Constitutional amendment Ahmadis refuse to identify themselves as Non-Muslims.

> "The impugned Ordinance is consequential to the Constitutional Amendment of 1974 by witch the Qadianis, whether belonging to the Lahori Group or others were declared non-Muslims in accordance with the dictates of Islamic Sharia. In implementation of the Constitutional fiat which was disregarded with impunity by the Qadianis, they have been restrained by the impugned Ordinance from directly or indirectly calling or posing themselves as Muslims or calling their faith as Islam.[16]

> "The Constitution of 1973 was amended by the Constitution (Second Amendment) Act, 1974 (Act XLIX of 1974) to amend Article 106 and Article 260 thereof. Clause (3) was added to Article 260 to declare those persons as non-Muslims who do not believe in the absolute and unqualified finality of

> Prophet or claims to be a Prophet in any sense of the word or of any description whatsoever, after Muhammad (p.b.u.h.) or recognizes such a claimant as a Prophet or a Religious Reformer." The Qadianis of the two groups are inter alia covered by this definition and they were thus declared non-Muslims.
>
> Article 106 dealt with the Constitution of Provincial Assemblies which specified the number of Members to be elected for the Assemblies, their qualifications and also the additional seats in those Assemblies reserved for non-Muslims, i.e. Christian, Hindu, Sikh, Buddhist and Parsi communities. To these communities were added by the Second Constitutional Amendment of 1974 "persons of the Qadiani Group or the Lahore Group (who call themselves Ahmadis)". [17]
>
> "Thus effect of Article 106 was given by declaration made in sub-Article (3) of Article 260 and Ahmadis of either persuasion were placed in juxtaposition with other minorities.
>
> Despite the provisions of the Constitution, the *Ahmadis persisted* in calling themselves Muslims and their faith as Islam."[18] *(Emphasis added)*

All this could not possibly be construed to mean that Ahmadis have always wanted to be a separate entity from the Muslims and that they were non Muslims of their own choice. Historically the Ahmadis have throughout maintained their Islamic identity and the very challenge before the Supreme Court indicated that. The fact that the court in its judgment was suggesting Ahmadis to modify their practices distinct from Muslim practices, and not to insist on the Islamic practices, destroys the argument of the Majority opinion. It however, amply demonstrates the socio political bias, which

runs through the judgment.

In fact the entire argument based on social cohesion and dissident minority needs to be closely examined. This argument was pressed into service in the case of Jehovah's Witnesses who refused to salute the flag. To salute or not to salute the national flag did appear to involve a question of National Unity. But that argument adopted in *Gobitis* was strongly repudiated in *Barnette* with the following observations,

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon, but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity"....."Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, Siberian exiles as a means to Russian unity....." "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."
>
> ".....But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[19]

Unfortunately however where the expediencies of

governments and trends of majority groups are made the basis of judgment, the majority opinions even though served under the name of religion are often a very complex socio political cum religious phenomenon and religion is often used as a ploy.

The religious and socio political argument is irrelevant and the statute and the judgment validating the statute, both are steeped into animosity, prejudice and bias. The judgment is therefore vitiated and needs to be reconsidered.

CONCLUDING REMARKS

Zaheer-ud-Din is a case of divided opinion. But the ratio of majority vote is not clear. On convictions under criminal charges the majority appears to be 4:1, while on Constitutional issues it appears to be 3:2. The validity of order under 144 CrPC, was challenged in *Mirza Khurshid Ahmad Vs Govt. of Punjab*, (Civil Appeal No. 412/92). This appeal was accepted by Justice Shafi-ur-Rahman. Saleem Akhter J agreed with him on this question. The majority opinion did not advert to the question at all. So the opinion is 2:0. The appeal of Mirza Khurshid Ahmad was not only wrongly decided, the error is apparent on the face of the record and is in conflict with the clear text of the law. The majority opinion on Article 2A, cannot be considered good law because *Hakim Khan* was not considered by the majority opinion at all. It was neither dissented from, nor overruled. Commenting on this aspect of the judgment Justice Dorab Patel observed:

> "As this view had been overruled a year earlier by the Supreme Court in Hakim Khan's Case, Abdul Qadeer J (Abdul Qadeer Chaudhry) did not have the jurisdiction to over rule Hakim Khan's Case. And even though two judges agreed with him, these three judges could not over rule Hakim Khan's Case"[1]

On the question of permissible restrictions, "*subject to law*" the case of *Jabindra Kishore* was not considered. Commenting on this aspect of the judgment, Justice Dorab Patel says,

> "The judge might have taken a different view, if he had considered the Supreme Court's judgment in Jabindra Kishore's case. He did not. That was unfortunate for another reason also. The legislature is presumed to be aware of the judgments of the country's highest court. Now the right to profess one's religion and the right of equality between citizens had been construed by the Supreme Court in Jabindra Kishore's case and Waris Meah's case (discussed earlier,), it follows that Article 20 and 25 of the 1973 Constitution had to be given the meaning placed on them by the Supreme Court in Jabindra Kishore's Case and in Waris Meah's case."[2]

Since the majority opinion in *Zaheer-ud-Din* neither considered nor over-ruled *Jabindra Kishore*, it seems we have two conflicting views from Supreme Court of Pakistan. The careless handling and misapplication of American Case Law has attracted adverse criticism from American legal circles. *Zaheer-ud-Din* suffers from many anomalies and needs to be thoroughly examined in some future case.

The legislation against Ahmadis created an imbalance in the society and has given rise to a culture of intolerance, which has led to increased sectarian hatred and violence. In fact most of the measures purportedly adopted by Zia-ul-Haq for Islamization, proved to be schismatic. This has led to the fragmentation of society and has dealt a serious blow to national solidarity. Religion has since been used as a political weapon.

The chief justice of High Court of Egypt Muhammad Said-al-Ashmawy. in his "ISLAM AND THE POLITICAL ORDER" observed:

> " God intended Islam to be a religion, but men have attempted to turn it into politics. Religion is general, universal, holistic; whereas politics is partial, tribal and limited in space and time. Hence, to restrict religion to politics is to limit it to a confined area and group, a specific region and moment. Religion tends to inspire man to the best that he can be; politics arouses his worst instincts, hence, to carry on politics in the name of religion is to transform the latter into conflicting groups and interminable struggle, it is to reduce it's goal to a search for prestige, position of power and financial gains."[3]

Speaking of the relationship between state and religion James Madison said:

> "It is proper to take alarm at the first experiment of our liberties....Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?[4]

Cognizant of these fundamental realities, Quaid-e-Azam Muhammad Ali Jinnah was very clear, unequivocal and emphatic in his views on the equality of citizen and nature of the government. He stated:

> "In any case Pakistan is not going to be a theocratic - to be ruled by priests with a divine mission. We have many non-Muslims-Hindus, Christians and Parsies-but they are all Pakistanis."[5]

In his speech as president of the constituent assembly of Pakistan he said:

> "You are free, you are free to go to your temples. You are free to go to your mosques or any other place of worship in this State of Pakistan. You may belong to any religion or caste or creed that has nothing to do with the business of the State." We are starting in the days when there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed or another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State." [6]

He further stated:

> "Now I think we should keep that in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual but in the political sense as citizens of the State." [7]

In saying so the Quaid was only echoing the spirit of the treaty of Madina where the Holy prophet (PBUH) treated all the components of the city of Madina including Jews and Muslims to be one political entity.

It is a curious phenomenon of history that patterns of religious persecution have closely followed one another in different times and places. In 1940, when *Gobitiss* case was decided and the court sustained compulsory flag salute, the decision was criticized severely, but, "some looked at the Court's approval of the compulsory flag salute as a signal for the use of more repressive measures against the Witnesses. Shortly after the decision, Witnesses were beaten and driven from several communities. Many local school officials enforced the

flag-salute requirement with increased vigor. "In several states the lower courts treated recalcitrant Witnesses' children as delinquents and confined them to state reform schools. The Court itself thus became a weapon in the struggle for men's minds."[8]

Similarly the decision in *Zaheer-ud-Din* sent wrong signals to the persecutors of Ahmadis. It was taken as a signal for the use of more repressive measures against Ahmadis and the graph of persecution touched high limits after the judgment.

The denial of self identification was followed by denial of right to profess religion of choice and curtailment of religious practices under 298-C PPC which was followed by interpretive broadening of denial of religious freedom by the judgments of courts which was further followed by converting the practice of religion by an Ahmadi into a terrorist activity, as the inclusion of section 295-A PPC in the schedule of Anti Terrorism Laws, in 1997, was used against Ahmadis. Ordinary cases under section 298C PPC pending in various courts, over a period of time, with no nexus with any terrorist activity were transferred to Anti Terrorist courts in order to procure quick convictions and long sentences. The Supreme Court has ruled in *Mehram Ali's* Case, that in order to attract jurisdiction of the Anti-Terrorist Court, the offense must have some nexus with terrorism. But the lower courts without regard to the letter and spirit of law continue to charge Ahmadis under Anti-Terrorism Act. The denial of religious freedom is pervasive and unmistakable.

In a study organized by International Center For

Human Rights And Democratic Developments in Pakistan it has been observed:

> "While Ahmedis are physically attacked, killed, and their property destroyed by religious extremists, the State has failed to take action which would secure their lives, bodily integrity and property. The impression that this community can be harmed with impunity has encouraged acts of violence against it. Anti-Ahmedi hatred is preached openly, and none of the country's laws has ever been invoked against those who have incited violence against them. Ahmedis have been targeted individually and collectively. There have been frequent incidents of Ahmedi villages being burnt, causing loss of life, property and vast displacement of population. Ahmedi places of worship are frequently attacked; burial grounds are desecrated; and congregation for religious purposes either attacked or threatened. State forces have never been deployed to protect the Ahmedis. Every time their assembly is threatened, the State prohibits such congregation through administrative orders on the pretext of preventing a law and order situation from developing."[9]

At times it appeared that in Pakistan state and clergy had merged their authority and none was available against the other to restore a balance in the society. As it is, the state seems to be using its political authority and apparatus to enforce change of theology by law. Ahmadis have suffered in silence and have suffered long. They have suffered the loss of suffrage and political rights. But in matters of faith and allegiance to *Kalima Tayyeba* they are prepared to lay their lives. They are an educated and disciplined community and do not believe in agitational methods. They have opted for the forensic battle. In such circumstances judiciary is the last hope

of the citizens. It is an imperative need of the time, and the citizen has a right to expect, that the courts should not yield their essential role as protector of fundamental liberties. The courts that do not protect the rights of minorities will soon find themselves able to protect none.

The dissent in the *Zaheer ud Din* judgment is truly an appeal to the brooding spirit of law, to the intelligence of a future day. How distant is that future and when will that *brooding spirit* awaken?

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* (Note: The peculiar circumstances here mentioned were that the two Ulema judges sitting on the appeal bench had expressed their opinion about the ordinance XX before being elevated to the court. They had publicly claimed in the national press and Pakistan Television that they had worked for the ordinance and had cited this as an achievement. In this view the appellants felt that the two judges had a closed mind on the issue and they should not sit on the bench. The two judges however said that they will not feel embarrassed and were open to change their view and opted not to retire from the bench. Another application of the appellants to be provided a copy of the tape recorded proceedings for preparation of the appeal and to meet the observations made in the judgment was also rejected another application for expunction of a part of the judgment of the Federal Shariat court was also refused)

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"....As long as the human beings are not free from error, no intellectual opinion can ever be the last word.

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.....I hope the members of the bar and the teachers of law will make it a tradition to publish fair comments on important judgements of the Supreme Court....."

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Antonio R. Gualtieri
Professor of religion (retired)
Carleton University. Ottawa. Canada

ERROR AT THE APEX

A chronicle and a critique of the legislative and the judicial events leading to gradual denial and erosion of religious freedom to Ahmadis in Pakistan. This work is intended to provide an insight into the background of the Supreme Court judgment in the Ahmadis' case.

Ahmadiyya community is internationally known and recognized among the international religions. The role and growth of the community has been a subject of many a research thesis in various universities of the world. There is a keen interest in, and a growing demand for greater information on, the situation of Ahmadiyya community in Pakistan. The purpose of the author in writing the present work is to elucidate and place on record some of the facts and errors which the ordinary reader finds confusing in the judgment of the Supreme Court of Pakistan.

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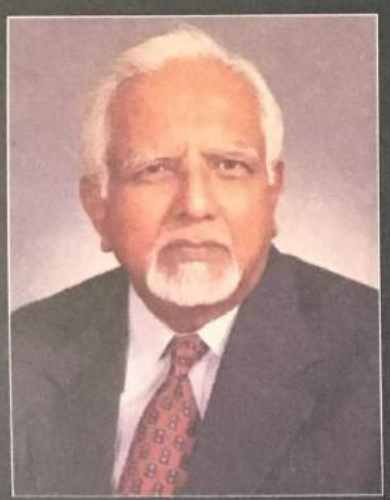
The Author



Mujeeb-ur-Rehman is an advocate of the Supreme Court of Pakistan. He is well-known in the legal circle of his country for his erudite scholarship and learning on Islamic Shariah and connected subjects. He has been associated with a number of international Human Rights organizations such as Amnesty International, the International Commission of Jurists (Geneva) and the Human Rights Advocates Inc. of the U.S.A., in their study and investigations of human rights situation in Pakistan. He along with some of his friends personally challenged the Ordinance XX of 1984 in the Federal Shariat Court of Pakistan. He has represented Ahmadiyya viewpoint in almost all important cases brought before the courts during the last more than two decades.

He has a background which puts him in a position to speak out of first hand knowledge and legal experience on the issue dealt with in this work.